83-672

No.

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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Dated: October 21, 1983

Questions Presented.

1) Whether, consistent with the Fourteenth Amendment to the United States Constitution and/or Title VII of the Civil Rights Act of 1964, a State may agree with minority plaintiffs to abrogate a civil service eligible list compiled on the basis of the results of a competitive promotional examination about which there has been neither inquiry, proof nor adjudication of discrimination against minorities and which the State denies discriminated against minorities in any way and instead substitute a promotional scheme which guarantees minorities a percentage of promotions equal to the percentage of minorities in the applicant pool and moves minorities ahead of whites who earned higher test scores over the objections of such whites whose promotions will be delayed for months or years causing loss of collectively bargained and other "time in title" seniority benefits including further promotional opportunity, and who assert that the examination was a non-discriminatory job-related "professionally developed ability test."

2) Whether, consistent with the Fourteenth Amendment to the United States Constitution and/or Title VII of the Civil Rights Act of 1964, a Federal Court may approve and enforce the agreement above without inquiry, proof or adjudication of unlawful discrimination against minorities.

3) Whether the passing white candidates have an interest protectable by the due process clause of the United States Constitution in their earned positions on the eligible list.

4) Whether the white civil service employees have a right to full intervention to protect their earned rank on the eligible list so as to allow such intervenors the right to defend the examination by which they achieved their rank on such list.

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Parties.

In addition to Frederick E. Althiser whose name appears in the caption, petitioners include those listed below.*

*Paul W. Annetts
William C. Badger
Arlo G. Baker
Philip Barbarello
John A. Battista
Edward J. Beauchemin
Robert L. Bennett
James E. Berg
Roland D. Besimer
John F. Bickford
Allen F. Blades
Howard Block
John O. Block
Ronald E. Bodge
Wilbert Boileau
Charles William Bowes
Harmon Boyd
Marilyn J. Bradt
Robert Butchino
Carl C. Caldwell
Alexander D. Campbell
Thomas E. Canning
Winifred V. Carron
Richard A. Cherry
Norman W. Christian
Lois B. Coffey
Ismael C. Colon
Clarence William Colwell
Dennis M. Conroy
James T. Conway
William L. Corlew
Fred R. Coutant
Wayne L. Cuer
Joseph DeCaterina
Andrew J. DeGaust
Richard Delany
Daniel L. Denkenberger
Thomas P. Devlin, Jr.
Edward T. DeVoe
Elwyn M. Dickson
Anthony J. DiDonna
Edward R. Donnelly
Richard P. Donohue
Donald J. Dunn
William Eddy
Carl Edwards
Kenneth Eissing
Paul E. Ellsworth
William H. Eull
Ludrick E. Fabian
John Festa
Thomas R. Fish
Peter J. Fitzgerald
Thomas R. Fitzgerald
Henry L. George
John F. Gilsenan
Orville J. Gload
Kenneth J. Goewey
Richard W. Gordon
Alan A. Gratto
Daniel B. Green
Melvin R. Greenfield
James C. Haight
Charles J. Hamel
James H. Handlin, Jr.
Neil Harris
Ronald D. Haseltine
Thomas Heffernan
Roy W. Henneberg
Hugh P. Hicks
Dennis E. Hoff
Bruce A. Kessler
Robert J. Kirby
Frank Kisch
Harry E. Klages
Charles A. Kline
Robert G. Knapp
Lewis J. Kordyl, Jr.
Marvin Kushner
Edward R. LaDuke
Gary J. LaVarnway
David Lavigne
Morton D. Lawliss
James H. Layhee
George Liberty
Joseph Michael Liffland
Aelred F. Lippold
Elendo J. Lombardi
Robert E. Mahoney
Richard P. Malark
Francis R. Maloney
Howard Maneely
George W. Manor
John McCabe
Robert J. McClellan
Russell J. McClellan
Patrick B. McGee
Gordon C. Melville
John T. Miner
Gary L. Mitchetti
James H. Morgan
Ferenc Morvai
Ronald W. Moscicki
H. J. Mulhall
Carl A. Nico
Gary C. Nolan
Ronald R. Norton
Louis Padilla
Max A. Palmer
Wilfred V. Parotte
Melvin A. Pavquette, Jr.
Daniel M. Pelton
Keith D. Perkins
Walter F. Pitt

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In addition to those named in the caption, respondents include, Thomas A. Coughlin III, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; The New York State Civil Service Commission; Joseph Valenti, individually and as President thereof and as a Civil Service Commissioner; Josephine Gambino and James McFarland, individually and in their capacity as Civil Service Commissioner; Edward L. Kirkland, Joseph P. Bates, Sr., Arthur E. Suggs, each individually and on behalf of all others similarly situtated; Robert McClay, Ray Smith, Charles Mutz, Gary Bartlett, Bob Pressel, L. Kinney, Gene Vanover, Herbert Jones, Larry George, Raymond Peters, Gordon Wells, Donald Carey, R. Vissmer, P. Bufalo, S. Delsanto, J. O'Rourke, R. Weed, D. Butterton, T. Brooks, James Bonnell, Jr., Ronald Krom, Wayne Elberth, Paul Borko, Ken Curry, John Higgins, Ronald Kurz, George Ribas, Mark Reeves, Joseph Mitchell, Al Luning, Ronald Kelly, Arthur Shuts, E. Hanscom, R. Wilson, V. Scott, V. Dunn, C. Harvey.

(Footnote continued)

Brian Pleace
Allyn D. Plowe
Richard S. Pochintesta
James L. Pollack
William D. Poole
Douglas W. Powers
Robert E. Racette
John R. Rafferty
Leonard C. Rathbun
Fred Rayce
Walter Redgate
Walter J. Rivers
Stanley M. Rushford
Charles T. Ryan
Dennis Ryan
George R. Schimdt
Patsy J. Sciarra
William G. Scott
Robert M. Semski
John Senchack
David A. Sharp
Arthur P. Sheets
Joseph H. Sheldon
John M. Sherlock
Harvey Jay Singer
James C. Sipe
Ronald C. Skinner
Francis J. Sluka
Larry D. Smith
Warren Smith
Norman Steinhilber
Arthur J. Steinhofer
William J. Stiles
Harold L. Streigold
Paul F. Stringham
John M. Sullivan
Gary Tauurmins
Neil A. Terwilliger
Francis W. Tessier
Dennis Thompson
James Tompkins
Robert J. Tyrell
Augustine E. VanOrden
Roger N. Walker
David W. Walsh
Conrad K. Walter
Jack Weiman
Betty J. Welch
Milo Williams
Ralph J. Wolcott
Donald R. Wolff
Arthur Wood
Norman M. Zelinsky

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

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v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below.

The June 8, 1983 opinion of the Court of Appeals is reported at 711 F 2d 1117 and is appended hereto as Appendix "A."

The July 27, 1983 order of the Court of Appeals denying the petition for rehearing is appended hereto as Appendix "B."

The December 1, 1982 opinion of the District Court is reported at 552 F. Supp. 667 and is appended hereto as Appendix "C."

The November 9, 1982 order of the District Court is appended hereto as Appendix "D."

The September 29, 1982 oral ruling by the District Court granting limited intervention is not officially reported. The transcript is appended hereto as Appendix "E."

Jurisdiction.

The Court of Appeals entered judgment on June 8, 1983 and denied petitioners' application for rehearing on July 27, 1983. Jurisdiction is conferred on this Court by 28 USC §1254(1).

Constitutional Provisions, Acts, Statutes and Rules and Regulations Involved.

United States Constitution, Fifth and Fourteenth Amendments; 42 U.S.C. §§2000e-2(h); 2000e-4, 5 (1976 and Supp. IV 1980); Fed. R. Civ. P. 24; New York State Constitution Article V, §6; New York Civil Service Law §§50, 51, 52, 56, 60, 61, 95; New York Civil Service Rules and Regulations 4 NYCRR §§3.6 and 4.2(a). These are set out *seriatim* in Appendix G.

Statement of the Case.

Introduction.

Petitioners, white civil service employees averaging 16 years of service, file this petition because the State has agreed with minorities to grant minorities a racial preference by lowering petitioners' test-based standing on and order of appointment from a civil service eligible list so as to guarantee minorities a preference and numerical equality of results as contrasted to equality of opportunity. The sole basis for the State action was statistically disparate results at some of the grading levels of the test. The State traded away what it did not own, petitioners' constitutional rights and earned promotional opportunity.

The Courts below, without seeing the test, approved the scheme and denied petitioners prejudiced thereby the right to defend their earned places on the list.

Facts.

Respondent State Civil Service Commission administered a civil service test for promotion to Correction Lieutenant on Oc-

tober 3, 1981. The test consisted of 60 questions. The number of questions answered correctly constituted a candidate's "raw score," to which 31 points were added. The total constituted the "adjusted test score." Seniority and veterans credits were then added and the result was the final "rating," with a potential maximum of 100. Final ratings were broken down to the nearest half-point.

On December 23, 1981 and pursuant to state law, a rank-order eligible list of 672 persons was established based on each person's final "rating." "Rank" on the eligible list was determined by the final rating with ties at each half-point level broken pursuant to a neutral scramble system. Minorities constituted 22% of the eligible list, approximately the same as the minority representation in the original pool of all candidates tested. No disproportionate racial impact existed at the pass/fail barrier.

The percentage of minorities in the candidate pool (22%) was not equally reflected at each grading level of the test, as shown by the following table:

Raw Score Grading Level	*Percent Minority*
50-54	7.9%
48-49	10.1%
45-47	20.8%
43-44	26.0%
39-42	33.8%

On January 15, 1982, plaintiffs sued alleging that defendants discriminated against them in preparing and administering the test and in promulgating the eligible list in violation of *inter alia* 42 USC §§2000e to 2000e-17 (1976 and Supp. IV 1980). At that time they moved to enjoin use of the list *pendente lite*.[1] The motion was denied. In February, 1982, plaintiffs again unsuccessfully sought a preliminary injunction. In opposition, the State submitted extensive evidence in defense of the test detail-

[1] The *factual* inquiry herein is limited to a challenge to one promotional examination. Allegations of past discrimination raised by the complaint were not pursued, were not the basis of the settlement agreement and are not involved.

ing the steps taken to insure that it was job-related. The proof shows that the examining authorities were fully cognizant of their duty under the Federal Civil Rights statutes to prepare a job-related "professionally developed ability test" and had made extensive efforts to fulfill that duty so as to withstand any legal challenge to the test. The record is replete with proof that the test was prepared by testing experts who utilized reports from and meetings with minority and white subject matter experts in developing the test.[2] The State, throughout, denied all of plaintiffs' allegations of discrimination, and their counsel certified that the test was a properly validated job-related test.

On August 20, 1982 respondents submitted for Court approval a settlement agreement in which the State denies that it had prepared or administered a discriminatory test or in any way discriminated against minorities.[3] The agreement specifically provided that both the plaintiffs and the State agreed that the settlement did *not* constitute an admission, either express or implied, of discrimination (5f, ¶12).* In addition, by using the test results as a basis for their appointment scheme, both

[2]The test has never been seen by the courts; however, the respondents have never suggested that the test was a mere general intelligence test such as those invalidated in *Griggs v. Duke Power Co.*, 401 US 424 (1971). Petitioners submitted their own uncontradicted affidavits showing the contrary.

[3]Respondents assert that the settlement agreement was the product of arms length negotiations. However, it was revealed for the first time during proceedings before the Court of Appeals that the respondents began settlement talks immediately after the action was commenced, and, in fact, had committed the substantive provisions of the settlement agreement to writing and had exchanged the same between themselves within ten days of the filing of the action, before the answer and before the State's successful opposition to the plaintiffs' motion for a preliminary injunction. Such facts raise serious questions about the motivations of the State. Nowhere in the record does the State assert that the test cannot be successfully defended. The record shows only that some State officials decided not to defend the test. The procedure of the courts below has effectively denied petitioners, the parties negatively impacted, all review of that decision and all opportunity to defend the test and their rights. See also, n. 7, 14 and accompanying text *infra*.

*Numbers and letters in parentheses refer to page numbers of a particular appendix appended thereto.

acknowledged that the test was a valid measure of differentiating between the qualifications of candidates.

The agreement provides that all who passed the test, including those already appointed, would be grouped into three "zones" based upon test performance as follows:

Zone	*Final Rating Score Range*	*Rank Range*
1	82.5+	1-247
2	78.0-82.0	248-525
3	73.5-77.5	526-672

All candidates scoring within a single zone are "deemed" to be of equal fitness and will be ranked within their zone by random selection. Appointments will be made first to all candidates in the highest unexhausted zone.

Minorities in the zone will be appointed first until the total number of minority appointees to that date equals 21%. Thereafter appointments will be made on a 4-to-1 ratio in each zone.[4]

[4]The agreement grants immediate preference to 32 minorities and institutes a 4-to-1 hiring ratio thereafter. The courts below were made aware of the dramatic practical impact of this scheme by the example of some white candidates, with a final rating of 82 who, under the original method, would stand between 248 and 283 on the eligible list but under the new scheme would rank between 500 and 525 with a consequent delay of two or more years in their time of appointment. The events since Court approval of the agreement bear this out. The District Court order became effective on November 9, 1982. All 32 immediately preferred minorities were appointed as positions became available, the last on July 7, 1983. At the very *least*, the agreement approved by the court below cost certain petitioners eight months of seniority benefits and eight months of the greater salary and emoluments that accompany employment at the higher rank. That loss especially the *irretrievable*, relative time in title seniority loss, impacts petitioners careers greatly; yet that is the *minimum* cost of the agreement to the petitioners. For those who, pursuant to the Court order, stood to be reranked from between 248 and 283 to between 500 and 520 the effect can be devastating to their careers as the delay in appointment can be years; the loss of seniority, salary and further promotional opportunity caused by such delay is immeasurable.

Further illustrating the effect of the agreement is the fact that as of October 18, 1983 no white eligible below the rank of 311 had been

(Continued on following page)

Notice of settlement was sent to each unappointed eligible. Each of the 170 petitioners, many of whom had served as provisional Lieutenants, submitted affidavits stating that they were familiar with the knowledge, skills and abilities required of and used in the position of Correction Lieutenants and that they found all the test questions to be related to and a measure of such duties, requirements, knowledge, skills and abilities. They

(Footnote continued)

appointed whereas minorities as low as 497 had received appointment. Many of the petitioners who would be enjoying the benefits of the promotion but for the racial preference must wait for the agreement to run its course. As of October 18, 1983 approximately 70% of the petitioners remain unappointed. The respondents agreement assures that these career civil servants will suffer injury to their careers for years to come.

Along these lines it is important to point out that the language of the agreement is vague as to the order of appointments of whites vis-a-vis whites and minorities vis-a-vis minorities within each zone. One of the respondents' criticisms of the eligible list and the theoretical basis for the institution of "zone" scoring was that the test could not distinguish between candidates with half point precision. The Courts below stated that there would be random selection within each zone and a re-ranking of all candidates within the zones to remedy what the respondents claimed to be the discriminatory effects of the rank order system.

However, both respondents indicated to the District Court that the original rank order system would be used within each race within each zone so that there would be no re-ranking of whites vis-a-vis whites or minorities vis-a-vis minorities. The State submitted affidavits explaining that the old rank order would be utilized within each race within each zone. It is understood that the state has made the appointments in the original rank order as modified by the minority preference. Thus, the Courts below approved a settlement different than that to which the respondents agreed and different than that to which respondents have adhered.

Petitioners submit that to re-rank whites vis-a-vis whites and minorities vis-a-vis minorities is unnecessary and even assuming *arguendo* that there was racial discrimination, no racial justification exists for such re-ranking and the unlawfully excessive intrusion on the rights of whites vis-a-vis whites.

The respondents' persistence in maintaining the rank order system is not without significance.It is further indication that they believe the test to be a sufficiently valid selection device to differentiate between candidates at the half point scores. The actual workings of the respondents' agreement reflect the respondents' recognition of the validity of the test and rank order eligible list as a selection device as well as the failure of the Court of Appeals to deal with the terms of the agreement actually before it.

also stated that the test was an accurate predictor of job performance.

At a September 29, 1982 "hearing" on the objections petitioners moved for intervention. The District Court ruled from the bench that "the intervenors are permitted to intervene for the sole purpose of objecting to the settlement . . ." (4e).[1] The State advised the Court that it had no interest in which of the qualified eligibles were appointed. Calling them "fungible". The expressed position of the State was simply that it "need not expend public funds for litigation . . ." (3f, ¶6). The practical effect of the State's action was a realignment of the parties.

Petitioners were in the position of having to assert that the ranks which they earned on the list by virtue of the test were rightfully earned. In the normal course of events if the test were found to be valid, petitioners would retain their rank-ordered position on the list, as had those who were appointed prior to the agreement. If, on the other hand, the test were not valid, some remedy congruent with the extent of the wrong would be called for. Petitioners repeatedly sought judicial review of the State's racial classification.

The Courts below, however, were unwilling to allow the very subject of the lawsuit, the test, to become the subject of inquiry. *THE COURTS NEVER SAW THE TEST.* The ultimate issue of discrimination *vel non* was never reached. Rather than consider whether the test was a valid job-related "professionally developed ability test" (42 USC §2000e(h)), the Courts limited inquiry to whether the agreement was reasonable in light of the test *results* and the *allegations* of the complaint.

The Court's approval of the State's racial classification and its refusal to allow inquiry into the question of the validity of the test was based solely upon the respondents' showing that the percentage of minorities in the applicant pool was not equally reflected at each grading level of the test. This, the Courts held, constituted "an existing condition which can serve as the proper basis for the creation of race-conscious remedies" (21a).

[1]Additional court sessions were held on October 4 and 14, 1982. Although denominated as hearings, all court sessions were confined to legal agrument. No proof was taken.

REASONS FOR GRANTING THE WRIT.

I. This case is important as it allowed a State to establish a racial classification depriving innocent and objecting career employees of promotional opportunity upon a mere unsubstantiated *claim* of discrimination.

The Court of Appeals has decided important questions of federal statutory and constitutional law which have not been, but should be, decided by this Court. The questions concern the standards for compromise by public employers of employment discrimination cases, the rights of the public employees prejudiced thereby and the extent of judicial remedial authority under both Title VII and the Constitution. These questions are important not only because of the frequency with which Courts are being asked to approve such class action settlements and the vast number of public employees whose individual rights are being affected thereby, but also because they call for definition of the line between permissible court ordered affirmative relief under Title VII and impermissible State action under the equal protection clause of the United States Constitution and Title VII.

The decision below is in conflict with the decisions of this Court; it approves an agreement between a State and the members of one racial group to prefer that group in promotions in the State's civil service without allowing inquiry into or proof or adjudication in any legislative, administrative or judicial forum of the existence of a constitutional or statutory violation. Instead, the Court's approval rests upon a finding of "a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact" (24a).

Ignored was this Court's holding that a "*prima facie* showing is not the equivalent of a factual finding of discrimination . . .", *Furnco Construction Corp. v. Waters*, 438 US 567, 579 (1978), and that this Court has "never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations." (Citations omitted) *Regents*

of the University of California v. Bakke ("*Bakke*"), 438 US 265, 307 (1978). There has been no finding by an "appropriate governmental authority . . . that such a violation has occurred." *Fullilove v. Klutznick*, 448 US 448, 498 (1980) (Powell, J., concurring). The political judgment of State officials not to "expend public funds for litigation * * *" (3f, ¶6) does not constitute such a finding, *Bakke, supra*, 438 US at 307-310, see also, *Fullilove v. Beame*, 48 NY 2d 376 (1979), and does not constitute a compelling State interest. *Connecticut v. Teal*, 457 US 440 (1982); *Milliken v. Bradley*, 433 US 267 (1977). On the facts herein the State does not have a compelling interest in creating a race-conscious remedy and no proof of discrimination of has been offered. To the contrary, the agreement contains not only the State's denial of unlawful discrimination (3f. ¶5) but also agreement *by both the plaintiffs and the State* that the stipulation does not constitute "an admission, express or implied, by said defendants of any violation, adjudication or finding with respect to any federal, state or local statute, rule, regulation or order or the Fourteenth Amendment" (5f, ¶12). The agreement which provides the sole basis for the action of the Courts below, on its face, negates the existence of any legal basis for a race-conscious remedy. The Court of Appeals has approved impermissible racial preference, not permissible remedial State action. See generally, *Bakke, supra*, 438 US at 306-10 (1978).[6]

Under the decision below, a state may grant a racial preference in promotion to minority test takers, reserve a portion of available promotions to those minorities and displace

[6]The Courts below emphasized the policy favoring voluntary compliance with Title VII implying that such policy somehow lessened or detracted from the substantive rights of the petitioners. In this connection the remarks of Judge Gee of the Fifth Circuit in which ten other judges of that Court joined are particularly apposite.

> "And while it is well and very well to extoll the virtues of concluding Title VII litigation by consent, as do our brethren—a sentiment in which we concur—we think it quite another to approve ramming a settlement between two consenting parties down the throat of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe. *United States v. City of Miami*, 644 F 2d 435, 451-52 (1981) (en banc) (Gee. J., concurring in part and dissenting in part). *See also W. R. Grace & Co. v. Local 759* ___ US ___ 76 L.Ed 2d 298 (1983).

whites with higher test scores, all in the absence of any showing of unlawful discrimination. The Courts have sheltered the State's action by prohibiting those prejudiced by the agreement from effectively litigating what this Court has termed the "ultimate question of discrimination *vel non*," *Aikens v. United States Postal Serv.*, ___ US ___, 51 USLW 4354, 4355 (1983). The ruling portends promotional decisions being made on the basis of class-wide statistics of racial and ethnic composition rather than upon individual merit as is required by State Law.[1]

As a basis for its determination that "[n]either Title VII nor the Constitution prohibits compromise agreements implementing race-conscious remedies which are agreed to prior to a judicial determination on the merits" (23a), the Court of Appeals relied upon *United Steelworkers v. Weber* ("*Weber*"), 443 US 193, 207-08 (1979) (Title VII) and *Bakke, supra*, 438 US at 301-02 & n.41 (Fourteenth Amendment). These authorities were incorrectly applied and misconstrued.

Weber determined only "whether Title VII forbids private employers and unions from voluntarily agreeing upon *bona fide* affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser-USWA plan." *Weber, supra*, 443 US at 200. No constitutional questions were presented, and this Court was "not concerned with

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[1]Contemporaneous events lend justification to this concern. In January, 1982, the State administered a test for Correction Captain, which it later averred was in all respects a valid, job-related "professionally developed ability test." However, *without notice*, the State altered the test scores by granting a racial preference and in September, 1982, promulgated an "eligibility list" using artificially inflated minority test scores and passing minorities who failed to achieve "statistical balance," in other words, equal test results. This secret racial preference in scoring came to light only when white candidates demanded to examine the test results and scoring methods. Regardless of its motiviation, the State voluntarily engaged in an unlawful racial classification elsewhere on the promotion ladder in the Department of Correctional Services. The United States District Court for the Northern District of New York has recently so held, *Bushey v. New York State Civil Service Commission*, 82 CIV 1219 (Slip Op., NDNY, October 4, 1983). The concealment of its grant of a racial bonus in *Bushey* can be likened to the State's adamant and strenuous objections to allowing the challenged examination to be made a part of the record herein.

. . . what a court might order to remedy a past proved violation of the act." *Weber, supra*, 443 US at 200. *Weber* simply does not touch upon the questions raised herein.*

The Court's reliance upon *Bakke, supra*, 438 US at 302 n.41, for the proposition that a public entity may enter into a settlement agreement which implements a race-conscious remedy without a finding of unlawful discrimination is misplaced. Footnote 41 is dictum and approves only "congressionally authorized *administrative* actions." *Id.* (Emphasis supplied). The actions to which the note refers are those of a federal agency, the E.E.O.C., which is charged by Congress with the duty of detecting violations of Title VII and formulating remedies. 42 USC §§2000e-4, 5. That situation presents different questions than here where there is an agreement between state officials and one racial group to provide preference in promotional practices to that group. *Bakke, supra*, 438 US at 309-10; *Hampton v. Mow Sun Wong*, 426 US 88, 103 (1976); *Fullilove v. Klutznick, supra*, 448 US at 497-502 (Powell, J., concurring). Further, the inquiry here is limited to one particular promotional examination, not "the various indicia of previous constitutional or statutory violations." Even if the note is in some part applicable, further elaboration thereupon is necessary to provide guidance for the large and increasing number of individual rights affected by consent decrees.

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*This case also presents important questions going to the scope of judicial remedial authority under Section 706(g) and the Constitution and the authority of a court to approve and enforce the settlement agreement. This cannot be discussed in depth in this petition, but a brief summary of the argument follows.

Section 706(g) prohibits Courts from ordering "promotion of an individual as an employee...for any reason other than discrimination...". No distinction is made between judgments entered after litigation and consent decrees. *System Federation No. 91 v. Wright*, 364 US 642 (1961). The language of the statute is the "starting point" in its interpretation. *Reiter v. Sonotone Corp.*, 442 US 330, 337 (1979) and here the statute proscribes a court order for any purpose other than to remedy discrimination.

The House Judiciary Committee's original version of Section 706(g) prohibited the courts from ordering affirmative relief for anyone who was refused employment for "*cause*". An amendment was introduced by Congressman Celler, Chairman of the Judiciary

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The State has made a political judgment as to how it will promote individuals in its civil service. Since that judgment "touch[es] upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background." *Bakke, supra*, 438 US at 299. The Courts below simply repudiated the constitutional guarantee.

Section 703(h) insulates the results of a job-related professionally developed ability test from being adjudged discriminatory because of mere disparate results. Disparate impact alone is insufficient to establish a violation of Title VII. *Bakke, supra*, 438 US at 307-09 & n.44. In addressing Section 703(h), the very section at issue herein, this Court recently held that a showing of disparate impact was insufficient to invalidate a seniority system. *Pullman-Standard v. Swint*, 456 US 273, 277 (1982). Nevertheless, the Court below, without reviewing the test, found that a showing of disparate impact was sufficient to invalidate the eligible list compiled on the basis of a "professionally developed ability test" protected by section 703(h). In so finding, the Court relied upon the statistical showing of a

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(Footnote continued)

Committee, to make explicit the limit upon the Courts' remedial authority. "Cause" was replaced by the phrase "*any reason other than discrimination on account of race...*" so that only victims of discrimination would be afforded affirmative relief. See, 110 Cong. Rec. 2467 (1964). *See, also id.* at 1518. For the remarks of Senate whips Humphrey and Kuchel all to the effect that the power of the courts is limited to ordering an end to discrimination that is *in fact* occurring. *See e.g. id.* 6549, 6563.

The legislative history and the statute are clear; Title VII relief can only be granted upon a showing of *actual discrimination* and only victims of the discrimination can benefit from affirmative relief. Only unlawful discrimination can be remedied and it must be proved.

The judicial authority to enforce this settlement agreement is further limited by constitutional principles. Racially based promotional agreements cannot be enforced by the federal courts. *Hurd v. Hodge*, 334 US 24 (1948); *Shelley v. Kraemer*, 334 US 1 (1948). *Weber* is not to the contrary.

prima facie case,[9] the sample pattern of proof recently reiterated in *Texas Department of Community Affairs v. Burdine*, 450 US 248 (1981) and its own decision in *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission*, 630 F 2d 79 (2nd Cir., 1980) *cert. den.* 452 US 940 (1981) for the proposition that a statistical showing of adverse impact creates a "presumption of Title VII discrimination." *Id.* at 88.

The Court then held that the State's "entrance into a compromise without rebutting an established *prima facie* case amounts to an admission of unlawful discrimination for purposes of Title VII." (25a) The reasoning is contrary to the decisions of this Court and the language in the agreement that "*[t]he consent of the defendants to this Stipulation shall in no way be construed as an admission, express or implied, by said defendants of any violation, adjudication or finding, with respect to any federal, state or local statute, rule, regulation or order, or the Fourteenth Amendment.*" (5f, ¶12) The Court below was aware that proof of actual discrimination and not statistical disparity alone, was necessary before race-conscious relief could be imposed. Finding no such proof in the record, the Court accorded exagerated weight to the policy favoring settlement of Title VII cases, in effect, excised the quoted language from the agreement, and created a fiction regarding the terms of the State's compromise agreement. As a result the State was permitted to trade away what it did not own, petitioners' constitutional rights and earned seniority benefits and promotional

[9]The *prima facie* finding does not result from any discrepancy at the pass/fail barrier, but consists only of the fact that the percentage of minorities in the applicant pool was not equally reflected at each grading level of the test. Such statistical disparity is entitled to far less weight than that given to a large disparity at the pass/fail barrier. The test did not act as an artificial barrier to employment opportunity.

opportunity without setting forth a compelling for such action.[10]

The Court below was without authority to ignore and distort the agreement presented by *both* parties for approval. The Court addressed the problem presented by the conflict between its finding of an admission of discrimination and the express disclaimer that the agreement constituted such an admission by simply copying a footnote from *Memphis Fire Department v. Stotts*, 679 F 2d 541, 553 n.10 (6th Cir., 1982) *cert. granted*, ____ US ____, 77 L Ed 2d 1331 (1983). The Court stated: "[W]e construe the disclaimers to be admissions that there is a statistical disparity together with a reservation of the right to explain it in the future" (citation omitted) (25a, n.16). The construction of the disclaimers as anything more than admissions of "statistical disparity" is baseless and should not be permitted to diminish petitioners' rights. Other than the fiction created by the Court of Appeals, all that was ever before the Courts below was unexplained statistical disparity.[11]

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[10]Even in situations where the employer is not a governmental entity and the equal protection clause does not govern its employment decisions, this Court has held that an employer cannot lawfully trade away the collectively bargained earned seniority rights of its white employees to obtain settlement of a Title VII case with the E.E.O.C. *W. R. Grace & Co. v. Local 759*, ____ US ____, 76 L. Ed. 2d 298 (1983). The reasoning of this Court should apply with greater force in this case. Here the employer has used as its *sole* "bargaining chip" not only the white employees employment rights but also, their *constitutional rights under the equal protection clause*.

[11]**The relief granted is not only inconsistent with the denials of discrimination, but such denials mean that the relief that is imposed is more than which is necessary to remedy the wrong. This court has always required that in cases such as this the remedy be carefully tailored so that it is congruent with the wrong. Relief that exceeds this purpose is unconstitutional. See generally, *General Building Contractors v. Pennsylvania*, ____US ____ 73 L.Ed 2d 835 (1982); *Regents of the University of California v. Bakke, supra*, 438 US at 299; *Hills v. Gatreaux*, 425 US 284, 293-94 (1976); *Milliken v. Bradley*, 418 US 717, 738, 744 (1974); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1, 16 (1971).**

The Court of Appeals rejected petitioners' contention that statistical disparity alone is an insufficient predicate for the imposition of a promotional scheme that prefers minorities and trammels the legitimate interests of the petitioners. This is error as decisions of this Court require some *proven* statutory or constitutional violation to remedy prior to the imposition of a race-conscious remedy. Otherwise, it is not a remedy at all but rather impermissible racial discrimination. Without the requisite finding of discrimination "it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm [upon petitioners]." *Bakke, supra,* 438 US at 309. There is no basis for a finding of discrimination here.

Instead of considering the constitutional and statutory rights of petitioners, the Court of Appeals utilized the "sample pattern of proof," *McDonald v. Santa Fe Trail Transportation Co.*, 427 US 273, 279 n.6 (1976), to abrogate those rights. This was error. The "sample pattern of proof" was "never intended to be rigid, mechanized or ritualistic [but] merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination," *Furnco Construction Corp. v. Waters, supra,* 438 US at 577 (1978). The "specification . . . of the *prima facie* proof required . . . is not necessarily applicable in every respect to differing factual situations." *McDonald v. Santa Fe Trail Transportation Co., supra,* 427 US at 279, n. 6 (1976); *McDonnell Douglas Corp. v. Green*, 411 US 792, 802 n. 13 (1973). The pattern of proof applied by the Court below was inappropriate for the facts of this case.

Approval of a "remedy" based upon the State's failure to come forward in turn pursuant to the "sample pattern of proof," resulted in a determination that impact alone could form the basis for the race-conscious "remedy." This "impact alone" analysis has been explicitly rejected, *Pullman-Standard v. Swint, supra, Bakke, supra,* 438 US at 308, n.44, but the Court of Appeals held that *Griggs v. Duke Power Co.*, 401 US

424 (1971) compelled such result.[12] (23a). It ignored the rule that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another. *Griggs* does not imply and this Court has never held that discrimination must always be inferred from such consequences." *Los Angeles Department of Water & Power v. Manhart, supra,* 435 US at 710 n.20. Likewise, it ignored the rules that a "*prima facie* showing is not the equivalent of a factual finding of discrimination," *Furnco Construction Corp. v. Waters, supra,* 438 US at 579, and that an adjudication of discrimination is a constitutional prerequisite to the imposition of a race-conscious remedy that trammels the interests of innocent third parties. *Bakke, supra,* 438 US at 307-10.[13]

More important the Court below ignored that what the State had done was to voluntarily agree to make a racial classification without any proof of justification or any compelling State interest. Had the State acted unilaterally or by agreement with the plaintiffs before commencement of suit the courts, on the facts in the record, would have set the agreement aside in an action by petitioners *Bushey v. New York State Civil Service Commission,* 82 Civ 1219 (Slip Op., N.D.N.Y. October 4, 1983). The mere fact that plaintiffs and not the petitioners paid the filing fee does not change the substantive rights of the parties or add to the power of the State or the Court.

The Court of Appeals' approval of the racial classification flies in the face of the teachings of this Court that "[a] racial classification, regardless of purported motivation, is *presump-*

[12] *Griggs* did not involve equal protection or the standard of proof to be applied when the employer was a governmental entity refusing to defend its tests, or whether innocent whites who were "bumped" could defend the test when the State refused or even whether such whites were entitled to judicial review of the State's action.

[13] There is no proof of discrimination except for the Court of Appeals' erroneous interpretation of the stipulation. The express provision that the settlement was not an admission of discrimination and everything else in the record demonstrates that the test was a valid, job-related "professionally developed ability test" within the meaning of Section 706(h). As set forth in the facts the State submitted extensive proof regarding the preparation and administration of the test in opposition to plaintiffs' applications for preliminary injunctive relief. Plaintiffs' motions were unsuccessful.

tively invalid and can be upheld only upon extraordinary justification." *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256, 272 (1979) No extraordinary justification for the presumptively invalid racial classification has been shown. Contrary to the presumption in the pattern of proof applied by the Court below, the constitutionally presumptive invalidity of the State's action requires the *State* to justify its racial classification.[14]

The Court below ignored the presumptive invalidity of the racial classification and the requirement that the State set forth "extraordinary justification" for its unequal treatment of petitioners and accepted as justification the State's decision not to defend the test. The construction given to the agreed disclaimers of any admission of unlawful discrimination as constituting "admissions that there is a statistical disparity together with "*a reservation of the right to explain it in the future*" (emphasis supplied) (25a, n. 16) ignores the fact that the State does not

[14]The *presumption* against racial classifications, *Personnel Administrator of Massachusetts v. Feeney, supra*, 442 US at 272, is deeply rooted in our law and reflects predominant and fundamental constitutional principles. See, e.g., *Loving v. Virginia*, 388 US 1 (1967). On the other hand, the presumption set forth in the "sample pattern of proof" is "merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." *Furnco Construction Corp. v. Waters, supra*, 438 US at 577. To the extent that the procedural presumption in the pattern of proof conflicts with the presumptive invalidity of racial classifications the presumption that racial classifications are invalid controls. The presumption "grounded in a predominant social policy [should be applied]". McCormick Evidence, §312 at 653 (1954); See, also, Weinstein's Evidence, ¶301[04] at 301-48-49, n.4. ("Rule 15 of the Uniform Rules of Evidence provides 'If two presumptions arise which are conflicting with each other, the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance, both presumptions shall be disregarded.')..." *Id.* Here, the sample pattern of proof used to infer discrimination in contested cases should give way to the presumptive illegality of the State's action thereby requiring the State to come forward with proof to justify its racial classification. This is in line with the teachings of *Bakke, supra* and *Fullilove v. Klutznick, supra*, which require an adjudication of discrimination prior to permitting the imposition of race-conscious remedies. Clearly, the procedural presumption allocating the burden of proof cannot govern the substantive rights affected by the settlement agreement.

have the power to reserve to itself the right to make racial classifications and justify them only when its political judgment so directs. The State cannot reserve its explanation for the racial classification for the future. All racial classifications must be supported by a showing of extraordinary justification. The Court below should have required the State to make such a showing. The State's admission of statistical disparity is that and only that and is *not* an admission of discrimination. It does not constitute the requisite extraordinary justification.

The decision below affords the State power, whenever minorities do not fare as well as whites on a competitive promotion test, and whenever its political views so direct, to determine that minorities will be proportionately represented in its civil service regardless of ascertained merit.[15] The decision denies prejudiced third parties judicial review of the test in question, participation in settlement discussions and judicial review of the racial classification. Here, since respondents committed the substantive provisions of the settlement to writing and exchanged the same within ten days of the filing of the complaint in this action, (See n.3, *supra*), it seems likely that the State's decision not to defend the test was based on political views rather than careful review by the State of its rebuttal evidence.[16]

In this sensitive area, resolution of the ultimate issue of discrimination *vel non* should not be left to the unreviewed discretion of State administrators. The discrimination claimed by plaintiffs was never proven or admitted. To base the displacement of the petitioners' rights and loss of seniority benefits and promotional opportunity upon a mere claim is con-

[15]The State, an employer of some 150,000 individuals, has made racially based changes to the results of other promotional examinations and has relied on the decision herein to assert that the State need not wait to be sued before it can remedy the adverse racial impact of an examination. Although these racially based changes were rejected in *Bushey v. New York State Civil Service Commission*, 82 CIV 1219 (Slip Op., NDNY, October 4, 1983), the fundamental error of the State's position and the decision below is that adverse impact is something to be remedied. It is not. Discrimination is the wrong to be remedied. Unless there is some proven discrimination, there is no wrong to remedy and racially based promotional decisions are impermissible racial preference, not permissible remedial actions.

[16]See note 7 *supra*.

trary to *EEOC v. Ford Motor Co.*, ____ US ____ 73 L. Ed. 2d 721, 738 (1982).

The State's choice not to contest the claim is far different than proven discrimination. *Furnco Construction Corp. v. Waters, supra*, 438 US at 579. Absent adjudication of discrimination, implementation of class-based preferential relief and the imposition of a minority hiring ratio is prohibited. The Courts below erred in approving this "race conscious remedy", the entire burden of which will be borne by the petitioners who are prepared to defend it and prove the test's validity.

II. The issues in this case are similar to those in a case now pending before this Court, and the case at bar should be heard as well.

This Court has granted Certiorari in *Memphis Fire Department v. Stotts*, 679 F 2d 541 (6th Cir., 1982) *cert. granted* ____ US ____, 77 L. Ed. 2d 1331 (1983) which present the question of whether a District Court has the authority to modify a consent decree between a public entity and minority plaintiffs by enjoining a seniority based layoff system and substituting a system based upon racial considerations absent any adjudication of discrimination by either the public entity or the union.

The similarity between *Stotts* and this case was recognized by the Court below as is shown by its reliance upon and many citations to *Stotts* in its opinion, (See, e.g., 14a, 15a, 20a, n.14, 21a, 24a & 24a n.15, 25a, n.16), and its borrowing of logic from *Stotts*. No adjudication of discrimination was made in either case. Both Courts of Appeals have placed a premium on insuring minorities proportionate representation in public employment without inquiring into whether or not there is any basis for disturbing the established state law procedure: a seniority system in *Stotts* and a promotional examination eligibility list herein. Both cases present questions which go to the heart of Title VII and the impact of Section 703(h)'s protection of *bona fide* seniority and merit systems and job-related professionally developed ability tests.

This Court has not yet established standards for initial Court approval of settlements containing race-conscious remedies which trammel the interests of non-minorities. As *Stotts* evidences, earlier consent decrees are now the subject of further litigation in part because of deficiences in those decrees. The Court is now called upon to review the steps taken to modify those decrees. Standards pronounced by this Court for such settlement agreements and judicial approval thereof are urgently needed by the lower courts, public employers and the millions of public employees affected thereby.

III. In determining the nature and scope of petitioners' rights, the Court of Appeals' decision is in conflict with the decisions of the New York Appellate Courts on matters of State Law.

The Court below rejected the argument that the bumping of the petitioners from their positions on the eligible list without an opportunity to be heard constituted a deprivation of a property interest without due process of law. This determination is contrary to New York Law. Under Article V, Section 6 of the State Constitution merit and fitness ascertained by competitive examination is the required basis for civil service promotions.

Implementing this mandate are State Statutes and the Rules and Regulations having the same force and effect. *Petrocelli v. McGoldrick,* 288 NY 25 (1942). The statutes provide for civil service tests, N.Y. Civ. Serv. L. §§50-52, certification of eligible lists, *Id.* §60, and appointments therefrom, *Id.* §61.

The appointing authority's discretion in making appointments is limited to choosing among the top three "ranked" individuals on the eligible list. N.Y. Civ. Serv. L. §61(1). When two or more candidates receive identical final examination "ratings," the tie is broken by a "uniform, impartial procedure." 4 N.Y.C.R.R. §3.6 (formerly Section 3.5) and a numerical "ranking," 4 N.Y.C.R.R. §4.2, is obtained. The State is bound by its own rules and regulations regarding examinations and the scoring thereof, *Frick v. Bahou,* 56 NY 2d

777 (1982), and enjoys no power to appoint any person except according to said law, rules and regulations. N.Y. Civ. Serv. L. §95.

While, under the rule of three, no one individual has a vested right to promotion by virtue of the promotional examination-list procedure, *Cassidy v. Municipal Civil Service Commission,* 37 NY 2d 526 (1975), "each competitive civil servant does have the right to be promoted in accordance with his placement on the promotional list resulting from such an examination." *Schuyler v. Department of Personnel,* 39 NY 2d 851 (1976) *aff'g* 47 AD 2d 948 (2nd Dept., 1975).

The Court below relied upon *Katz v. Hoberman,* 28 NY 2d 530 (1971) and *Metzger v. Nassau County Civil Service Commission,* 54 AD 2d 565 (2nd Dept., 1976) for the proposition that the State has discretion to choose and modify the procedures to determine merit and fitness (18-19a). Those cases involve discretion in special circumstances and very limited areas having nothing to do with the area of minority preferences. The extent of the State's discretion in the area of minority preference was clearly defined in *Ruddy v. Connelie,* 61 AD 2d 372 (3rd Dept., 1978). In *Ruddy,* the Court made clear that without a finding that the civil service test was invalid or that the minority preference was designed to correct past errors, the State has no power to adjust established appointment procedures and whites have standing to challenge the same. See also, *Burke v. Sugarman,* 35 NY 2d 39 (1974). Similar attempts by public entities in New York State to modify existing regulatory procedures have met with judicial disapproval. See *Fullilove v. Beame,* 48 NY 2d 376 (1979); *Broidrick v. Lindsay,* 39 NY 2d 641 (1976); *Subcontractors Trade Ass'n v. Koch,* ___ AD 2d ___ (1st Dept., 1983). Under New York Law the State has no right to modify the State Law promotional procedures.[11]

[11]The appointing authority is required to appoint one of the top three candidates on the eligible list. N.Y. Civ. Serv. L. §61(1). Thus, while no one particular person has the right to promotion, the State is without authority to deny the promotion to more than two of the petitioners. The practical effect is that the petitioners as a group have a legitimate expectation of appointment.

In addition, petitioners are third-party beneficiaries of the collective bargaining agreement between their union and the State which in Article 24 defines seniority as "length of an employee's uninterrupted service *in title*" (emphasis supplied) and provides that seniority is the basis for certain contract benefits. Article 24 also provides for announcement of all Lieutenant job vacancies and for job assignment on the basis of seniority when ability is equal. Since there are a limited number of Lieutenant posts, and those are at over 30 job locations scattered across the state, even a few days difference in date of appointment can mean the difference between working at a desired location or moving hundreds of miles. Furthermore, seniority is critical for career advancement since a Lieutenant's eligibility to sit for the test for Correction Captain and for promotion to that job requires certain minimum periods of service as a Lieutenant.

While promotional procedures are governed by rules, regulations and statutes, Article 27 of the contract provides:

> "With respect to matters not covered by this Agreement, the Employer will not seek to diminish or impair during the term of this Agreement any benefit or privilege provided by law, rule or regulation for employees without prior notice to the Union and when appropriate, without negotiations with the Union provided, however, that this agreement be construed consistent with the free exercise of rights reserved to the Employer by Article 6 of this Agreement."

No such notice was given to the union and no such negotiations were had.

Article 31.1 of that contract provides *inter alia* "Neither party will, during the term of this agreement seek to unilaterally modify its terms through legislation or other means which are available to them." The State Law already discussed prohibits promotion of any person . . . except in accordance with the Civil Service Law and the rules and regulations established thereunder. N.Y. Civ. Serv. L. §95.

The Court below, ignoring the rule that all contract provisions be given effect and harmonized, interpreted Article 6 and the last clause of Article 27.1 as emasculating and virtually repealing all of the rest of Article 27.1 and the above quoted portions of Article 31. It also ignored the interaction between the contract and the Civil Service Law and erroneously concluded that the contract leaves "unimpaired" the authority of the Civil Service Commission to choose and modify promotion procedures. As set forth above, however, the State does not have the right to make the adjustments made herein. N.Y. Civ. Serv. L. §95. The collective bargaining agreement therefore prohibits the State from compromising of litigation without following the procedures set forth therein or without some overriding constitutional or statutory basis therefor. No such showing has been made. The decision below is in conflict with firmly established State Law which forms a basis for determining the nature and extent of petitioners' rights.[14] *Board of Regents v. Roth*, 408 US 564, 577-78 (1972).

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[14]The Court of Appeals' decision is also in conflict with its own earlier decision interpreting the nature of white intervenors' interest in similar litigation:

> "The Courts of New York hold that one whose efforts secure him a position upon a civil service promotion list, 'is entitled to consideration and protection in such position.' (citing *Barlow v. Craig*, 210 App. Div. 716, 719 (1st Dept., 1924); *Barlow v. Berry*, 245 NY 500, 503 (1927).) Whether this be termed a right or a privilege is of no significance; constitutional rights do not turn on such issues.
>
> "So long as civil service remains the constitutionally mandated route to public employment in the State of New York, no one should be 'bumped' from a preferred position on the eligibility list solely because of his race." *Kirkland v. New York State Department of Correctional Services*, 520 F 2d 420, 429 (2nd Cir., 1975) *cert. den.* 429 US 823 (1976) (*Kirkland I*)

The Court below then recognized that under New York Law a position on the eligible list was a protectable interest. Here, it points to no intervening change in New York Law, but reverses of its earlier interpretation thereof. The most significant decisions since *Kirkland I* in this area, *Schuyler v. Department of Personnel*, *supra*, and *Frick v. Bahou*, *supra*, reinforce earlier cases and do not signify any change in state law. The principles announced in *Kirkland I* were adopted by the Fifth Circuit. *See United States v. City of Miami*, 664 F2d 435, 447 (5th Cir., 1981) *(en banc)*

Based on its incorrect interpretation of New York Law, the Court below distinguished *United States v. City of Miami*, 614 F 2d 1322 (5th Cir., 1980) *aff'd in part and rev'd in part* 664 F 2d 435 (1981) (*en banc*). Had the Court below correctly applied State Law regarding petitioners' protectable interests, it would have been obliged to follow *City of Miami, supra,* or create an obvious irreconcilable conflict between the circuits. The Court below has erred in its interpretation of State Law. The underlying conflict between the circuits exists and cannot be hidden by the strained interpretation of New York Law herein. Review is required.

IV. The questions concerning the scope and nature of intervention are intertwined with the questions going to the merits of the litigation and are exceedingly important.

The Court of Appeals recognized that "[Q]uestions relating to the scope and nature of intervention are attaining increasing importance in cases involving the approval of consent decrees or stipulations which, in settling employment discrimination suits, create race or sex-conscious hiring or promotional remedies that affect non-complaining employees. (Citations omitted)." (13a) The Court below affirming the mere limited intervention, held that petitioners did not have sufficient interest to permit them to offer proof to rebut the *prima facie* case. It failed to give adequate consideration to the impairment of petitioners' interests and the failure of the State to represent adequately those interests in reaching its decision to settle.

This Court has stated that whites enjoy legitimate "expectations of promotions and seniority that must be balanced against the interests of the minorities." *International Brotherhood of Teamsters v. United States,* 431 US 324, 375-76 (1977) and has rejected suggestions that whites have no legally relevant interest in an action challenging a racial preference. *Fullilove v. Klutzick, supra,* 448 US at 514-517 and n.13 (Powell, J., concurring). Assuming *arguendo* that petitioners do not have a state law based property interest, they nevertheless have a pro-

tectable constitutional right not to be discriminated against by their public employer. If the State has the right to disregard and alter the eligible list, such alteration cannot be upon unconstitutional considerations. *Id.* Here, the eligible list was altered on the basis of a presumptively invalid racial classification.

Petitioners' interests were not protected by the parties to the litigation. Once the settlement agreement was signed, the interest of the State respondents immediately became antagonistic to that of the petitioners. After this realignment of interests, petitioners are in the position of plaintiffs challenging State action which classifies on the basis of race. They have a right to be heard and to require the respondents to prove the validity of the presumptively invalid classification.

Conclusion.

The Courts are being asked with increasing frequency to approve settlement agreements in public employment discrimination cases. Millions of citizens work as public employees and are vitally concerned with their rights under civil service laws, collective bargaining agreements, Title VII, the Constitution, the interaction of these authorities and the impact thereof on their careers. It is important for this Court to set uniform standards for the Courts to follow in the voluntary settlement of public employment discrimination cases and to define the nature and extent of the rights of *all* interested parties including those prejudiced by such settlements. The case is important and should be heard.

Respectfully submitted,

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APPENDIX A—Decision in the United States Court of Appeals, June 8, 1982.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 828, 909—August Term, 1982

(Argued February 3, 1983 Decided June 8, 1983)

Docket Nos. 82-7830, 82-7874

EDWARD L. KIRKLAND, JOSEPH P. BATES, SR., ARTHUR E. SUGGS, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

—against—

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; THOMAS A. COUGHLIN, III, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; JOSEPH VALENTI, individually and in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; JOSEPHINE GAMBINO and JAMES MCFARLAND, each individually and in his/her capacity as Civil Service Commissioner,

Defendants-Appellees,

FREDERICK E. ALTHISER, et al.,

Intervenors-Appellants-Appellees,

ROBERT J. McCLAY, et al.,

Intervenors-Appellees-Appellants.

Before:

FEINBERG, *Chief Judge*,
LUMBARD and KEARSE, *Circuit Judges.*

Appeal by intervenors in action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, from two orders of Judge Griesa of the Southern District of New York. The first order allowed intervenors to intervene on the condition that their intervention would be limited to the purpose of objecting to a proposed settlement between plaintiffs-appellees and defendants-appellees, and the second order approved the settlement.

Affirmed.

O. PETER SHERWOOD, ESQ., New York, N.Y. (Jack Greenberg, Esq., Penda D. Hair, Esq., New York, N.Y., of counsel), for Plaintiffs-Appellees.

BARBARA B. BUTLER, Assistant Attorney General, State of New York, New York, N.Y. (Robert Abrams, Attorney General of the State of New York, Dennis H.

Allee, First Assistant Attorney General, George D. Zuckerman, Assistant Solicitor General, Ann Horowitz, Assistant Attorney General, New York, N.Y., of counsel), for Defendants-Appellees.

RICHARD R. ROWLEY, ESQ., Albany, N.Y. (Rowley, Forrest and O'Donnell, P.C., Albany, N.Y., Ronald G. Dunn, Esq., Mark T. Walsh, Jr., Esq., of counsel), for Althiser, et al., Intervenors-Appellants-Appellees.

HERBERT B. HALBERG, ESQ., New York, N.Y. (Beck, Halberg & Williamson, New York, N.Y., Roman Beck, Esq., of counsel), for McClay et al., Intervenors-Appellees-Appellants.

LUMBARD, *Circuit Judge:*

Edward Kirkland and other minority Correction Sergeants in the New York State Department of Correctional Services ("DOCS") brought this class action on January 15, 1982 alleging that Promotional Examination No. 36-808 ("Exam 36-808"), given on October 3, 1981 for the position of Correction Lieutenant by DOCS and the New York Civil Service Commission ("CSC"), and Exam 36-808's resulting eligibility list are racially discriminatory against blacks and hispanics in violation of, *inter alia,* Title VII of the Civil Rights Act of 1964, 42 U.S.C.

§§ 2000e to 2000e-17 (1976 and Supp. IV 1980).[1] On August 20, 1982, pursuant to Fed. R. Civ. P. 23(e), the parties submitted proposals of settlement to Judge Griesa of the Southern District of New York. After due notice, Judge Griesa held hearings on September 29 and October 4 and 14, 1982 during which he heard objections from two groups of non-class members ("intervenors"), *i.e.*, non-minority correctional officers, who, at the September 29, 1982 hearing, had been permitted to intervene on the condition that their intervention would be solely for the purpose of objecting to the proposed settlement. On November 9, 1982, Judge Griesa approved the settlement and filed an opinion on December 1, 1982. 552 F. Supp. 667. In their appeal, intervenors challenge Judge Griesa's grant of conditional intervention as well as his approval of the settlement. On November 16, 1982, on intervenors' motion, we stayed Judge Griesa's order of approval and expedited argument of the appeal. We affirm.

I. *BACKGROUND*

A. *Exam 36-808 and its Resulting Eligibility List.*

Exam 36-808, a written test consisting of sixty multiple choice items, was administered by CSC on October 3, 1981 to 739 candidates, of whom 169 (22.9%) were

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1 This is the second class action filed by Edward Kirkland and other minority correctional officers challenging as racially discriminatory the promotional selection procedures employed by DOCS. The first lawsuit, *Kirkland v. New York State Department of Correctional Services*, 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part and rev'd in part*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976), *on remand*, 482 F. Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981) ("*Kirkland Sergeants*"), involved a successful challenge to the selection procedures used to promote correctional officers to the rank of Correction Sergeant.

minority. Of the 625 candidates who passed the test, 148 (22.0%) were minority. Thus, minority candidates had an overall pass rate of 88% (148 out of 169 minority candidates passed), only slightly below the 92% pass rate of non-minorities (527 non-minority candidates passed).

On December 23, 1981, CSC certified an eligibility list ranking the passing candidates according to their final scores, which were calculated by adding seniority and veterans' credits to the candidates' adjusted scores.[2] Although the overall minority representation on the eligibility list (22.0%) was approximately the same as the minority representation in the total candidates pool (22.9%), minority representation within the eligibility list's rank-ordering system was disproportionately low at the list's top and high at the list's bottom.[3] A racial/ethnic breakdown of the candidates' raw scores, which reflect only the number of correct answers given, shows that the awarding of seniority and veterans' credits to qualifying candidates did not play a significant role in

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2 A candidate's adjusted score was determined by adding 31 points to the number of items answered correctly. *See* 4 N.Y.C.R.R. § 67.1(h). Seniority credits were added on the basis of 1.0 point for each five years of service. *See id.* § 67.2. Veterans were entitled to have 2.5 points, or 5.0 points if they were disabled, added to their scores, but this credit could be claimed only once in an officer's career. N.Y. Civ. Serv. Law § 85 (McKinney 1983).

3 The racial/ethnic breakdown of the eligibility list is as follows:

Position Rank Nos.	*Percent Minority*	*Number Minority*	*Number Non-Minority*
1-107	5.6%	6	101
108-229	9.8%	12	110
230-298	16.0%	11	58
299-416	19.5%	23	95
417-525	29.4%	32	77
526-619	33.0%	31	63
620-672	47.2%	26	28

causing the uneven distribution of minorities on the eligibility list.[4]

Appointments according to rank-order on the eligibility list began in early January, 1982. Of 171 initial appointments, 17 (9.9%) were minority. By July 28, 1982, 222 candidates had been promoted to Correction Lieutenant, of whom only 20 (9.0%) were minority. As of September 29, 1982, 225 appointments had been made, of which 21 (9.3%) went to minority candidates.

B. *The Settlement Agreement.*

On January 15, 1982, immediately after the first appointments from the eligibility list, plaintiffs brought this class action. They alleged that DOCS, CSC, and their high officers had engaged in unlawful discrimination against blacks and hispanics in the development and administration of Exam 36-808 and in the use of the resulting eligibility list to make permanent promotional appointments to the position of Correction Lieutenant. Plaintiffs contended that Exam 36-808 was discriminatory because (1) it resulted in a disproportionately low number of minority appointments and (2) it was not job-related. The complaint sought an injunction against the continued use by defendants of all racially discriminatory practices, damages in the form of back pay for alleged past discrimination, and other relief, including the development

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4 The raw scores showed the following racial/ethnic breakdown:

Score Range	*Percent Minority*	*Number Minority*	*Number Non-Minority*
50-54	7.9%	7	82
48-49	10.1%	12	107
45-47	20.8%	42	160
43-44	26.0%	27	77
39-42	33.8%	53	104

of non-discriminatory selection procedures for promotion and the implementation of steps to redress the discriminatory effects of Exam 36-808 and its resulting eligibility list.

In August 1982, following seven months of discovery proceedings and extensive settlement negotiations, the parties entered into a settlement agreement which contains two basic elements "to assure that minorities by reason of their race are not disadvantaged by the employment policies, procedures and practices within . . . [DOCS], and that any disadvantage to minorities which may have resulted from the use of Examination No. 36-808 is remedied as provided herein so that equal opportunity will be provided for all." Settlement Agreement art. I(7). First, it provides measures to adjust the current eligibility list to eradicate all disproportionate racial impact. Second, it provides for the development and administration of new selection procedures for promotion to Correction Lieutenant and Correction Captain which will be employed after the current eligibility list for Exam 36-808 has been exhausted.[5]

1. *Adjustment of the Current Eligibility List.*

The agreement provides that all candidates who have received appointments from the eligibility list will retain their appointments and that appointments will continue until the list is fully exhausted, *i.e.*, "until every eligible

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5 In their complaint, plaintiffs had also alleged that because appointments made from Exam 36-808's eligibility list determined who would be eligible to sit for the examination for promotion to Correction Captain, that examination was necessarily tainted by unlawful discrimination. The Correction Captain's examination was administered on January 30, 1982, but as of August 20, 1982, the date on which the settlement agreement was submitted to Judge Griesa, no eligibility list resulting from that test had yet been certified.

on the 36-808 List has been offered an appointment and has been afforded a reasonable opportunity to either accept or decline." Settlement Agreement art. VI(5)(c). The agreement seeks to eliminate the eligibility list's adverse impact on minorities by modifying its rank-ordering system. All candidates who passed Exam 36-808, including those candidates who have already been appointed, are to be placed into three zones based on their final test scores which, as discussed above, include seniority and veterans' credits.[6] Of the 225 appointments which had been made by September 29, 1982, most were offered to candidates who would place in the highest zone.[7]

The agreement contains the following procedures to govern future promotions from the eligibility list.[8] All candidates falling within a single zone are to be deemed to be of equal fitness and will be ranked within their zone by random selection. Appointments will then be offered by rank order to those candidates in the highest unexhausted zone. However, these appointments will first be offered to minority candidates in this zone until minority appointments amount to 21% of all appointments made, a number approximately reflecting the percentage of

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6 The breakdown of the zones is detailed in the following table:

Zone	*Score Range*	*Rank Range*	*Number of Eligibles*
1	82.5+	1-247	233
2	78.0-82.0	248-525	286
3	73.0-77.5	526-672	153

7 There are circumstances, such as when a candidate declines to accept an appointment at a particular facility, which result in appointments being made other than in strict rank order.

8 Although the basic features are contained in the settlement agreement, further details were provided by counsel at the hearing of September 29, 1982 and are contained in the minutes.

minorities on the eligibility list.[9] Thereafter, appointments will be made in a ratio of 4 to 1, non-minority to minority, until the eligibility list is exhausted. In any event, no minority applicant in a lower zone will be eligible for appointment until appointments have been offered to *all* candidates, regardless of race, in the highest unexhausted zone. Finally, candidates will only be offered appointments to facilities or locations at which they have expressed a willingness to serve. If no minority candidate has designated the facility or location at which a vacancy occurs, the appointment will be offered to non-minority candidates notwithstanding the fact that the 21% ratio has not been achieved.

2. *Future Promotional Procedures for Correction Lieutenant and Correction Captain.*

The agreement also requires the parties to work toward the development of new selection procedures for promotion to Correction Lieutenant and Correction Captain which do not have an adverse racial impact and which are job-related. These procedures are to be employed after the current eligibility list is exhausted. The agreement requires defendants to "consider the possibility of alternatives or supplements to written examinations, including use of oral examination or assessment center techniques," Settlement Agreement art. VI(7)(c), but it does not mandate adoption of any specific approach. In short, the agreement suggests various procedures that

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9 Judge Griesa noted that since 225 appointments had been made as of September 29, 1982, of which 21 were minority appointments, the number of minority appointments needed to reach the 21% ratio is small: "If 32 minority appointments are made, the total appointments would be 257 of which 53 (or 21%) would be minority." 552 F. Supp. at 671.

have been used successfully in other situations to insure that future selection processes are not racially discriminatory.

C. *The Proceedings in the District Court.*

The settlement agreement was submitted to Judge Griesa on August 20, 1982 for approval pursuant to Fed. R. Civ. P. 23(e). Pursuant to an order of Judge Griesa, due notice was given to members of the plaintiff class and to each candidate on the eligibility list who had not yet been appointed that objections would be heard on September 29, 1982. The notice included a summary of the settlement's terms and a statement that any DOCS employee could file objections to the settlement with the district court.

Two groups of non-class member/non-minority correctional officers appeared at the September 29, 1982 hearing and sought intervention. After hearing the proposed intervenors' objections to the settlement and their application for intervention, Judge Griesa, considering intervenors' application to be a request for permissive intervention under Fed. R. Civ. P. 24(b), ruled from the bench that "the intervenors are permitted to intervene for the sole purpose of objecting to the settlement . . . ." Judge Griesa stated that he was limiting the intervention primarily because the application was untimely. He found that intervenors had known of the action since its inception, and that although they were present at a July 14, 1982 conference at which the terms of the settlement were fully discussed, they did not then press for intervention and in fact appeared to favor the concepts and general terms of the settlement. Accordingly, Judge Griesa believed that it would be unfair to grant unlimited intervention because the parties "through hard work, careful

thought and extensive negotiation" had decided "that there was no need for a trial and that there could be a settlement," while intervenors had taken no formal steps to intervene until after a settlement had been reached. He also noted that there was a "serious question" whether intervenors, even if granted unconditional intervention, would have sufficient standing beyond that enabling them to object to the settlement to require a full blown trial at which they would be permitted to defend the validity of Exam 36-808.

Additional hearings were held on October 4 and 14, and the parties and intervenors thereafter submitted briefs. On November 9, 1982, Judge Griesa issued an order approving the settlement on the grounds that it was "fair, reasonable and lawful in all respects" and that the intervenors' objections were "without merit." In his subsequent opinion of December 1, 1982, 552 F. Supp. 667, Judge Griesa wrote:

> The present settlement agreement is not only justified by legal precedent, but is inherently reasonable and sound as a matter of policy. The benefits to plaintiff class of minority applicants inevitably result in some detriment to non-minority correctional officers competing for promotion to the rank of Lieutenant. However, the benefits to plaintiff class are modest and are carefully tailored to the precise problem raised by them in litigation. By the same token, the detriment to the non-minority applicants is also modest and is in fact considerably less than what might have occurred if plaintiffs had pressed their litigation to the end and not agreed to a settlement [*i.e.*, those appointments already made could have been declared null and void].

Id. at 671.

Specifically, Judge Griesa found that the statistical demonstration of the eligibility list's disproportionate racial impact established a *prima facie* case of Title VII discrimination under *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977), and held that a reasonable basis therefore existed for entering into a settlement creating race-conscious remedies. 552 F. Supp. at 670, 672-75. Next, he determined that the remedies provided by the settlement were neither unreasonable nor unlawful on the grounds that the adjustment of the eligibility list into zones did not violate either state law or intervenors' federal constitutional rights and that the settlement's racial preference procedures did not constitute an unconstitutional quota. *Id.* at 675-77.

Intervenors challenge Judge Griesa's September 29, 1982 grant of conditional intervention and his subsequent approval of the settlement. On November 16, 1982, we granted intervenors' motion for a stay of Judge Griesa's order and expedited argument of the appeal.[10] Thereafter, a third group of correctional officers, consisting of Correction Sergeants not on the current eligibility list but eligible to take the next examination for promotion to

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10 Our November 16, 1982 order granting the stay incorporated a provision of the appellees' proposed order, contained in their opposition papers, which provided:

> [T]hat if provisional appointments are made, that they be made in accordance with the terms of the settlement, that if the settlement agreement is upheld, minority officers be given retroactive seniority credits.

On March 4, 1983, we granted the request of the parties, including the intervenors, to modify the stay to read as follows:

> [I]f the settlement agreement is upheld, all provisional Lieutenants appointed pursuant to the stay granted by this Court, minority and non-minority, shall be given permanent status in the title of Correction Lieutenant as of the date of their provisional appointment pursuant to the stay for all purposes, including probation.

Correction Lieutenant, sought leave to intervene for, *inter alia,* the limited purpose of urging that a four year maximum life be imposed on the current eligibility list. We denied the motion and instead granted these proposed intervenors leave to file briefs as *amici curiae.*

II. *THE QUESTION OF CONDITIONAL INTERVENTION*

Questions relating to the scope and nature of intervention are attaining increasing importance in cases involving the approval of consent decrees or stipulations which, in settling employment discrimination suits, create race or sex-conscious hiring or promotional remedies that affect non-complaining employees. *See, e.g., Stotts v. Memphis Fire Department,* 679 F.2d 579 (6th Cir.), *cert. denied,* 103 S. Ct. 297 (1982) ("*Stotts II*"); *Culbreath v. Dukakis,* 630 F.2d 15 (1st Cir. 1980); *Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.,* 573 F.2d 960 (7th Cir. 1978) (per curiam), *cert. denied,* 439 U.S. 876 (1979); *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co.,* 556 F.2d 167 (3d Cir. 1977), *cert. denied,* 438 U.S. 915 (1978). Judge Griesa permitted the non-class member/non-minority intervenors to intervene, limiting their intervention to objecting to the proposed settlement, as he held their application was untimely. For different reasons we agree that intervention should have been so limited.

Intervenors' reason for challenging Judge Griesa's grant of conditional intervention is their belief that, if afforded full intervention, they would have equal standing with the original parties; thus, their consent to the agreement would be required, and, in the event that they were dissatisfied with the agreement, they could then

force a trial at which they would be permitted to defend the validity of Exam 36-808. We disagree.

As Judge Griesa suggested at the September 29, 1982 hearing, the sum of rights possessed by an intervenor, even if granted unconditional intervention, is not necessarily equivalent to that of a party in a case and depends upon the nature of the intervenor's interest. *See Boston Tow Boat Co. v. United States,* 321 U.S. 632 (1944); *Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc., supra,* 573 F.2d at 964; *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., supra,* 556 F.2d at 173; *see also* Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators,* 81 Harv. L. Rev. 721, 727 (1968) [hereinafter Shapiro]. Non-minorities do not have a legally protected interest in the *mere* expectation of appointments which could only be made pursuant to presumptively discriminatory employment practices. *See Franks v. Bowman Transportation Co.,* 424 U.S. 747, 775-78 (1976); *Stotts II, supra,* 679 F.2d at 583-84 & n.3; *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., supra,* 556 F.2d at 173. Accordingly, the legal rights of non-minorities generally are not adversely affected by *reasonable* and *lawful* race-conscious hiring or promotional remedies, whether such remedies are imposed by court order following litigation on the merits or are created by voluntary agreement between the parties. *See Stotts II, supra,* 679 F.2d at 583; *Stotts v. Memphis Fire Department,* 679 F.2d 541, 554, 556, 558 (6th Cir. 1982), *cert. granted,* 51 U.S.L.W. ____ (U.S. June 6, 1983) (No. 82-229) ("*Stotts I*"); *Setser v. Novack Investment Co.,* 657 F.2d 962, 970 (8th Cir. 1981) (en banc); *Prate v. Freedman,* 583 F.2d 42, 47 (2d Cir. 1978); *Equal Employment Opportunity Commission v.*

American Telephone & Telegraph Co., supra, 556 F.2d at 173. It follows, therefore, that although non-minority third parties allowed to intervene in cases which involve consent decrees or settlement agreements implementing race-conscious hiring or promotional remedies do have a sufficient interest to argue that the decree or agreement is unreasonable or unlawful, their interest in the expectation of appointment does not require their consent as a condition to any voluntary compromise of the litigation. *See Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc., supra,* 573 F.2d at 964; *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., supra,* 556 F.2d at 173 (interests of a third party in a consent decree limited to appropriateness of the remedy); *see also Stotts II, supra,* 679 F.2d at 584 n.3 (dictum); *Stotts I, supra,* 679 F.2d at 554; *In re Fine Paper Litigation State of Washington,* 632 F.2d 1081, 1087 (3d Cir. 1980); *Kirkland Sergeants,* 520 F.2d 420, 424 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976); Shapiro, *supra,* at 756 n.157 ("It might . . . be possible to hold that persons allowed to intervene in a consent decree proceeding could argue . . . that the decree was inadequate but could not veto the entrance of the decree . . . ."). Indeed, a rule indiscriminately enabling all intervenors in these cases to veto proposed compromises would seriously hamper efforts to settle Title VII cases, *see Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc., supra,* 573 F.2d at 963, thereby frustrating Congress's expressed preference for achieving Title VII compliance by voluntary means. *See, e.g., Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974); *Berkman v. City of New York,* No. 82-7654, slip op. at 2726 (2d Cir. March 29, 1983).

United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981) (en banc), is not to the contrary. Reviewing the approval of a Title VII consent decree between the government and the defendant-city, the panel decision in that case, 614 F.2d 1322 (5th Cir. 1980), *aff'd in part and rev'd in part*, 664 F.2d 435 (1981) (en banc), held:

> Unless the FOP [the named defendant-union] can demonstrate that it has been ordered to take some action by the [consent] decree, or ordered not to take some action, *or that its rights or legitimate interests have otherwise been affected*, it has no right to prevent the other parties and the Court from signing the decree.

Id. at 1329 (footnotes omitted) (emphasis supplied). None of the separate opinions in the en banc decision expressly disputed this rule. *See* 664 F.2d at 447 (plurality opinion); *id.* at 452-53 (Gee, *J.*, concurring in part and dissenting in part); *id.* at 453 (Tjoflat, *J.*, dissenting); *id.* at 462 (Johnson, *J.*, concurring in part and dissenting in part). Instead, contrary to the panel's determination, a majority of the en banc court held that the consent decree did in fact adversely affect the defendant-union's legally protected interests "insofar as it deprive[d] the FOP and its members of the benefit of the promotion procedure that was in effect a part of the FOP contract [*i.e.*, collective bargaining agreement] with the [defendant] City." *Id.* at 447 (plurality opinion); *see id.* at 452-53 (Gee, *J.*, concurring in part and dissenting in part). Thus, the defendant-union's consent was required before the decree could be approved not because of its mere status as a full defendant in the case, but because the decree bound the

defendant-union to a compromise which altered its contractual rights.[11]

Intervenors contend, however, that like the defendant-union in the *City of Miami*, they possessed specific contractual rights under their union's collective bargaining agreement with the state which would be impaired by the settlement agreement. We disagree. In *City of Miami*, the relevant contract provision, entitled "Prevailing Benefits," provided in pertinent part:

> All job benefits in effect at the time of the execution of this [A]greement heretofore authorized . . . [by ordinance], not specifically provided for or abridged by this [A]greement, *shall remain in full force and effect for the duration of this Agreement.*
>
> The City and the Employee Organization will . . . negotiate any proposed changes in those rights and benefits not specifically covered by this Agreement, *provided however no changes shall be made except by mutual consent* and any impasse shall not be subject to the Impasse Resolution as provided for in [the Agreement].

664 F.2d at 446 (emphasis supplied). Holding that this provision prevented the defendant-city from altering all relevant, existing ordinances without the defendant-union's consent, the court ruled that the defendant-union

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11 The plurality opinion in *City of Miami* concluded as follows:

> A party potentially *prejudiced* by a decree has a right to a judicial determination of the merits of its objection. *The party is prejudiced if the decree would alter its contractual rights* and depart from the governmental neutrality to racial and sexual differences that is the fundament of the fourteenth amendment in order to redress past discrimination.
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> 664 F.2d at 447 (emphasis supplied).

had a clear contractual right in the existing Miami Civil Service Ordinance, which provided for promotion procedures, and that the existence of this right prevented the approval of a consent decree altering the promotion procedures without the defendant-union's concurrence. *Id.* at 446-47; *id.* at 452 (Gee, *J.*, concurring in part and dissenting in part). The collective bargaining agreement in the present case between intervenors' union and the state contains only one provision that could possibly encompass promotion procedures. Entitled "Preservations of Benefits," article 27 of the agreement provides:

> With respect to matters not covered by this Agreement, the Employer will not seek to diminish or impair during the term of this Agreement any benefit or privilege provided by law, rule or regulation for employees without prior notice to the Union and when appropriate, without negotiations with the Union *provided, however, that this Agreement shall be construed consistent with the free exercise of rights reserved to the Employer by Article 6 of this Agreement.*

(Emphasis supplied). Article 6, in turn, provides that "[e]xcept as expressly limited by other provisions of this Agreement, *all of the authority, rights and responsibilities possessed by the Employer are retained by it.*" (Emphasis supplied). The difference between these provisions and the *City of Miami* provision is clear. Unlike the *City of Miami* provision, the plain language of articles 6 and 27 leaves unimpaired the New York State CSC's authority over examinations and eligibility lists, which affords it wide discretion to choose and modify the procedures it sees fit to determine merit and fitness. *See, e.g., Katz v. Hoberman,* 28 N.Y.2d 530 (1971); *Metzger v. Nassau*

County Civil Service Commission, 54 A.D.2d 565, 386 N.Y.S.2d 890 (2d Dep't 1976). Accordingly, it cannot be said that these provisions give intervenors a specific contractual right in the preservation of their positions on the Exam 36-808's eligibility list.[12]

The only interest, therefore, that intervenors possess is their mere expectation of promotion pursuant to possibly discriminatory selection procedures. This interest alone, though it entitles intervenors to be heard on the reasonableness and legality of the agreement, is not so strong as to require their consent to the agreement. Thus, Judge Griesa granted intervenors the intervention rights to which their interest entitled them when he permitted them to intervene solely to object to the settlement. *See Airline Stewards & Stewardesses, Local 550 v. American Airlines, Inc., supra,* 573 F.2d at 964; *Equal Employment Opportunity Commission v. American Telephone & Telegraph Co., supra,* 556 F.2d at 173. Thus, we reject intervenors' challenge to Judge Griesa's grant of conditional intervention without reaching the question of timeliness.[13] We note, however, that if intervenor's application was in fact untimely, it would have been within Judge

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12 Even if the collective bargaining agreement's provisions gave intervenors a legal right in the existing promotional procedures, such a right would not allow intervenors to veto the settlement unless it also was shown that New York law permitted the authority of the CSC to be circumscribed by private agreement. *See United States v. City of Miami, supra,* 664 F.2d at 447.

13 The nature and effect of intervenors' interest would also be important to a timeliness analysis, since the prejudice that intervenors would suffer from a limitation of intervention is an element to be considered in determining whether an application was timely under the circumstances. *See, e.g., Garrity v. Gallen,* 697 F.2d 452, 455 (1st Cir. 1983); *Stallworth v. Monsanto,* 558 F.2d 257, 264-66 (5th Cir. 1977); *see also NAACP v. New York,* 413 U.S. 345, 364 (1973); *United States Postal Service v. Brennan,* 579 F.2d 188, 191 (2d Cir. 1978).

Griesa's discretion to deny them any form of intervention. *See, e.g., Stotts II, supra,* 679 F.2d at 582-86; *Culbreath v. Dukakis, supra,* 630 F.2d at 20-25.

III. *THE PROPRIETY OF APPROVING THE SETTLEMENT AGREEMENT*

It is settled that voluntary compliance is a preferred means of achieving Title VII's goal of eliminating employment discrimination. *See, e.g., Carson v. American Brands, Inc.,* 450 U.S. 79, 88 n.14 (1981); *Alexander v. Gardner-Denver Co., supra,* 415 U.S. at 44; *Berkman v. City of New York, supra,* No. 82-7654, slip op. at 2726; *Williams v. City of New Orleans,* 694 F.2d 987, 991 (5th Cir. 1982), *reh'g granted,* No. 82-3435 (Feb. 14, 1983); *Patterson v. Newspaper & Mail Deliverers' Union,* 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied,* 427 U.S. 911 (1976). Accordingly, voluntary compromises of Title VII actions enjoy a presumption of validity,[14] *see, e.g., United States v. City of Alexandria,* 614 F.2d 1358, 1359, 1362 (5th Cir. 1980); *Vulcan Society of New York City Fire Department, Inc. v. City of New York,* 96 F.R.D. 626, 629 (S.D.N.Y. 1983), and should therefore be approved "unless . . . [they] contain[] provisions that are unreasonable, unlawful, or against public policy." *Berkman v.*

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[14] Specifically, Title VII settlements are afforded a presumption of validity because they "may produce more favorable results for protected groups than would more sweeping judicial orders that could engender opposition and resistance," *Vulcan Society of Westchester County, Inc. v. Fire Department of City of White Plains,* 505 F. Supp. 955, 961 (S.D.N.Y. 1981); *see also Vulcan Society of New York City Fire Department, Inc. v. City of New York,* 96 F.R.D. 626, 629 (S.D.N.Y. 1983), and because they also reduce the cost of litigation, promote judicial economy, and vindicate an important societal interest by promoting equal opportunity. *Stotts I, supra,* 679 F.2d at 555.

City of New York, supra, No. 82-7654, slip op. at 2726 *see also United States v. City of Miami, supra,* 664 F.2c at 441 (voluntary compromise affecting third partie should be approved only if the court is "satisfied that th effect on them is neither unreasonable nor proscribed" (plurality opinion). We have recently held that "the dis trict court's approval of a [Title VII] settlement should b upheld unless it constituted an abuse of discretion.' *Berkman v. City of New York, supra,* No. 82-7654, sli op. at 2726-27; *see also Patterson v. Newspaper & Mai Deliverers' Union, supra,* 514 F.2d at 771.

The probability of plaintiffs' success on the merits an the range of possible relief are factors that courts hav considered important in determining whether a Title VI class action settlement agreement should be approved *See, e.g., Reed v. General Motors Corporation,* 703 F.2 170, 172 (5th Cir. 1983); *Plummer v. Chemical Bank,* 66 F.2d 654, 660 (2d Cir. 1982); *see also Carson v. America Brands, Inc., supra,* 450 U.S. at 88 n.14; *City of Detro v. Grinnell Corporation,* 495 F.2d 448, 455 (2d Cir. 1974) *See generally* 7A C. Wright & A. Miller, Federal Practic and Procedure § 1797, at 230-31 (1972). We believe tha when such a settlement implements race-conscious rem dies, these factors can be encompassed by two centra inquiries: (1) whether there is an existing condition whic can serve as a proper basis for the creation of race-cor scious remedies; and (2) whether the specific remedies c the compromise agreement are neither unreasonable nc unlawful. *See Stotts I, supra,* 679 F.2d at 552-53; *Setser Novack Investment Co., supra,* 657 F.2d at 967 & n.4 Intervenors' objections follow these two questions an can be summarized as follows: (1) that before any rac conscious relief can be granted to plaintiff class, ther must be a judicial determination that Exam 36-808 and it

resulting eligibility list are not job-related and are therefore racially discriminatory, *i.e.*, a mere statistical showing of disproportionate impact does not amount to a proper basis for settlement; and (2) that in any event, the terms of the settlement agreement are unreasonable and unlawful.

A. *The Proper Basis for Settlement.*

Judge Griesa, finding that the statistical demonstration of the eligibility list's disproportionate racial impact established a *prima facie* case of Title VII discrimination, F. Supp. at 670, determined that this case alone served as a "sufficient showing of serious questions of racial discrimination under Title VII" to justify a settlement containing race-conscious remedies. *Id.* at 675. Intervenors, however, argue that because the district court did not consider the validity of Exam 36-808, its approval rested on an inadequate foundation and thus should be reversed. Intervenors also assert that, in any event, Judge Griesa erred in finding a *prima facie* case of discrimination. We find no merit in these contentions.

1. *The Prima Facie Case as the Proper Basis.*

The gist of intervenors' first contention is that because § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h) (1976), provides that a "professionally developed ability test" is not unlawful even though it results in a disparate impact, a judicial determination that Exam 36-808 was not job-related, and thus not a "professionally developed ability test," *see Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971), was required before a proper basis for settlement could exist. Intervenors' argument, however, would turn Title VII law on its head since, as intervenors themselves

concede, job-relatedness is never presumed and only becomes an issue after it is affirmatively raised by the defendant. *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981); *Griggs v. Duke Power Co., supra,* 401 U.S. at 432. Moreover, if intervenors' position were adopted, no Title VII testing case could be settled by agreement until a judicial determination on the test's job-validity was made. Such a result would seriously undermine Title VII's preference for voluntary compliance and is not warranted. *See Regents of University of California v. Bakke,* 438 U.S. 265, 364 (Brennan, *J.*, concurring in part and dissenting in part); *Equal Employment Opportunity Commission v. Safeway Stores, Inc.,* 611 F.2d 795, 801 (10th Cir. 1979), *cert. denied,* 446 U.S. 952 (1980).

Neither Title VII nor the Constitution prohibits compromise agreements implementing race-conscious remedies which are agreed to prior to a judicial determination on the merits. *See United Steelworkers of America v. Weber,* 443 U.S. 193, 207-08 (1979) (Title VII); *Regents of University of California v. Bakke, supra,* 438 U.S. at 265, 301-02 & n.41 (Powell, *J.*, announcing the judgment of the Court) (fourteenth amendment); *see also Prate v. Freedman, supra,* 583 F.2d at 47 n.4 ("Our decision in *United States v. Wood, Wire & Metal Lathers International Union, Local 46,* [471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939 (1973)] . . . foreclosed the argument that preferential hiring relief may only be based on formal finding of past discrimination made after an evidentiary hearing.") In class actions the principal requirement for such a settlement is that there be a reasonable basis for the compromise, *i.e.*, some showing of probability of success on the merits. *See, e.g., Reed v. General Motors Corporation, supra,* 703 F.2d at 172;

Plümmer v. Chemical Bank, supra, 668 F.2d at 659-60; *Setser v. Novack Investment Co., supra,* 657 F.2d at 968. When the settlement contains race-conscious relief affecting third parties, some well substantiated claim of racial discrimination against the plaintiff class is necessary "to ensure that new forms of invidious discrimination are not approved in the guise of [race-conscious remedies]." *Setser v. Novack Investment Co., supra,* 657 F.2d at 968; *see also Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir.), *cert. denied,* 454 U.S. 1124 (1981); *Vulcan Society of New York City Fire Department, Inc. v. City of New York, supra,* 96 F.R.D. at 629.

We agree with Judge Griesa that a showing of a *prima facie* case of employment discrimination through a statistical demonstration of disproportionate racial impact constitutes a sufficiently serious claim of discrimination to serve as a predicate for a voluntary compromise containing race-conscious remedies. *See Stotts I, supra,* 679 F.2d at 552; *Setser v. Novack Investment Co., supra,* 657 F.2d at 968; *Vulcan Society of Westchester County, Inc. v. Fire Department of City of White Plains,* 505 F. Supp. 955, 962 (S.D.N.Y. 1981).[15] A statistical showing of adverse impact creates a "presumption of Title VII discrimination," *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission,* 630 F.2d 79, 88 (2d Cir. 1980), *cert. denied,* 452 U.S. 940 (1981), which, if unrebutted by any showing that the contested practice was job-related, requires the court to enter a decree finding unlawful discrimination. *Id.* at 88;

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15 Both the Sixth and Eighth Circuits believe that a statistical imbalance falling short of a *prima facie* case is sufficient to constitute a proper basis for settlement. *Stotts I, supra,* 679 F.2d at 555 n.10 (6th Cir.); *Setser v. Novack Investment Co., supra,* 657 F.2d at 968 (8th Cir.).

see Texas Department of Community Affairs v. Burdine, supra, 450 U.S. at 253-54; *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 418 (1975). Such a finding, in turn, gives the district court "broad, although not unlimited, power to fashion the [race-conscious] relief it believes appropriate." *Berkman v. City of New York, supra,* No. 82-7654, slip op. at 2719. Accordingly, because a judicial finding of unlawful discrimination under Title VII allowing the imposition of race-conscious remedies can be made on the showing of a *prima facie* case when the defendant fails to rebut the case, we think that an unrebutted *prima facie* case is sufficient to serve as a proper basis for a settlement containing race-conscious remedies when the defendant chooses to enter into a compromise. *See Prate v. Freedman, supra,* 583 F.2d at 47. Simply stated, a defendant's entrance into a compromise without rebutting an established *prima facie* case amounts to an admission of unlawful discrimination for purposes of Title VII.[16] *Id.* at 47; *see also United States v. City of Miami, supra,* 664 F.2d at 442.

2. *The Prima Facie Case.*

Intervenors' next assert that, in any event, there existed no basis for the settlement since Judge Griesa erred in finding a *prima facie* case of discrimination. We disagree.

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16 Although the settlement agreement contains disclaimers of any admission of unlawful discrimination, Settlement Agreement arts. I(5) & (12), the defendants do not dispute the facts showing an adverse impact. Because such disclaimers are used in many compromises of this nature to protect defendants from making themselves vulnerable to large backpay awards, *see United States v. City of Alexandria, supra,* 614 F.2d at 1365 n.15, we construe the disclaimers to be admissions that there is a statistical disparity together with a reservation of the right to explain it in the future. *Id.; see also Stotts I, supra,* 679 F.2d at 553 n.10.

Judge Griesa determined that a *prima facie* case of employment discrimination had been established after reviewing the statistics relevant to Exam 36-808 and its eligibility list. 552 F. Supp. at 670. Finding that the difference between the percentage of minorities actually appointed as of July 28, 1982 (9.0%) and the percentage which would be expected to be appointed from a random selection amounted to the level of 5.86 standard deviations,[17] Judge Griesa ruled that the statistics made out a *prime facie* case of Title VII discrimination under *Castaneda v. Partida,* 430 U.S. 482 (1977). *Castaneda* stated, that in cases involving significant statistical samples, "if the difference between the expected value [from a random selection] and the observed number is greater than two or three standard deviations," a *prima facie* case is established since the deviation then could only be regarded as caused by some factor other than chance. *Id.* at 496 n.17.

Intervenors do not challenge Judge Griesa's use of the *Castaneda* test, but rather, for the first time on appeal, they assert that he did not apply the law to the appropriate set of facts. They contend that Judge Griesa's use of

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17 In *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 86 n.4, we defined the concept of standard deviation as follows:

> The standard deviation for a particular set of data provides a measure of how much the particular results of that data differ from the expected results. In essence, the standard deviation is a measure of the average variance of the sample, that is, the amount by which each item differs from the mean. The number of standard deviations by which the actual results differ from the expected results can be compared to the normal distribution curve, yielding the likelihood that this difference would have been the result of chance. The likelihood that the actual results will fall more than one standard deviation beyond the expected results is about 32%. For more than two standard deviations, it is about 4.6% and for more than three standard deviations, it is about .03%.

the final test scores as a statistically significant sample was improper because these scores reflected the addition of seniority and veterans' credits which may have caused the uneven distribution of minorities on the eligibility list. We disagree. A breakdown of the candidates' raw scores, *see* note 4 *supra,* shows that the awarding of seniority and veterans' credits did not play an appreciable role in creating the uneven distribution. Accordingly, Judge Griesa's use of the final scores could not have resulted in error. *See Kirkland Sergeants, supra,* 520 F.2d at 425 (racially disproportionate impact need not be proven with complete mathematical certainty); *Vulcan Society of New York City Fire Department, Inc. v. Civil Service Commission,* 490 F.2d 387, 393 (2d Cir. 1973) (same).

Intervenors next contend that the number of actual minority appointments does not show disproportionate impact because this number does not account for the number of minorities who refused offers of appointment. Again, if it was improper for Judge Griesa not to consider this factor, such a measure was harmless since, based on the figures offered by intervenors themselves, the refusal rate for minorities was approximately equal to the refusal rate of non-minorities.

Intervenors' final contention is that the disproportionate distribution on the eligibility list was caused by the fact that a large number of the minority candidates had recently been transferred to DOCS from the State's Office of Drug Abuse and thus took Exam 36-808 with minimal DOCS experience. This contention is also without merit. Although lack of experience may be relevant to the question of a test's job-validity, it does not affect the question whether a *prima facie* case has been properly established. *See Albemarle Paper Co. v. Moody, supra,* 422 U.S. at 425; *Griggs v. Duke Power Co., supra,*

401 U.S. at 433-36. Moreover, differences in responsibility between Office of Drug Abuse officers and officers working at minimum and medium security DOCS facilities has been held to be negli[redacted]*kes v. New York State Department of Correcti[redacted]ices*, No. 80 Civ. 1364 (S.D.N.Y. Sept. 27, 1982).

Accordingly, we agree with Judg[redacted]esa that a sufficient basis existed for the parties to enter into the settlement agreement.

B. *The Reasonableness and Legality of the Settlement Agreement.*

Because the settlement agreement was submitted for approval without any judicial determination on the merits, the reasonableness and legality of the agreement under federal law must be measured against the allegations of the complaint and the relief which might have been granted had the case gone to trial.[18] *United States v. City of Alexandria, supra,* 614 F.2d at 1364. Simply stated, the remedies provided by a Title VII settlement, especially those containing race-conscious relief, must be substantially related to the objective of eliminating the alleged instance of discrimination, *see Stotts I, supra,* 679 F.2d at 553; *Valentine v. Smith, supra,* 654 F.2d at 510; *United States v. City of Alexandria, supra,* 614 F.2d at 1366; *Detroit Police Officers' Association v. Young,* 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied,* 452 U.S. 938 (1981), and must not unnecessarily trammel the interests

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18 Because state law must yield to federal law in Title VII cases, *see Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 105; 42 U.S.C. § 2000e-7 (1976), we need not consider whether the settlement agreement violates state law.

of affected third parties. *See United Steelworkers of America v. Weber, supra,* 443 U.S. at 208; *United States v. City of Alexandria, supra,* 614 F.2d at 1366.

The alleged discrimination was the administration of Exam 36-808 and the use of its resulting eligibility list. As previously discussed, the entrance of defendants into the settlement in the face of plaintiffs' unrebutted *prima facie* case of discrimination amounts to an admission that the practice giving rise to the *prima facie* case, *i.e.,* Exam 36-808 and its eligibility list are reasonable and legal since they substantially relate to the objective of eradicating the discriminatory impact caused by Exam 36-808 and its eligibility list and are not overly oppressive to the interests of non-minorities.

1. *Future Selection Procedures.*

The settlement agreement requires the parties to cooperate in the development of new selection procedures for promotion to Correction Lieutenant and Correction Captain, which are to be used after the exhaustion of the current eligibility list. The agreement encourages abandonment of the written test as the sole indicator of merit and urges the creation of racially neutral selection procedures better designed to assess the candidates' abilities. This part of the settlement, which intervenors do not challenge, operates solely to eliminate the adverse effect of Exam 36-808 and to assure compliance with Title VII in the future. Moreover, it does not trammel any interests of non-minorities. Thus, it is a proper remedy under the circumstances. *Berkman v. City of New York, supra,* No. 82-7654, slip op. at 2722-23; *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 109.

2. *Adjustment of Rank-Ordering into Zones.*

Intervenors do, however, object to the settlement's provisions adjusting the eligibility list's rank-ordering system into zones. They contend that the modification of the list is not a proper Title VII remedy since it imposes a procedure by which candidates will be appointed without regard to merit or fitness and that, in any event, the positions of candidates on the eligibility list constituted vested property rights which could not be altered without due process of law. We find no merit in these contentions.[19]

Recognizing the fact that small differences between the scores of candidates indicate very little about the candidates' relative merit and fitness, we have held that as a means of insuring compliance with Title VII "the employer can acknowledge his inability to justify rank-ordering and resort to random selection from within either the entire group that achieves a properly determined passing score, or some segment of the passing group shown to be appropriate." *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 104; *see also Vulcan Society of Westchester County, Inc. v. Fire Department of City of White Plains, supra,* 505 F. Supp. at 964. By the terms of the settlement, each zone contained an average of 230 candidates whose final scores differed by no more than four points out of a possible final score of 88, excluding

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19 We also find no merit in intervenors' oblique argument that the adjustment of the eligibility list into zones by itself amounted to an unlawful quota. Because the mere creation of zones in no way requires that a minimum number of appointments be given to minority candidates, it cannot be said that any race-conscious preference was established. *Kirkland Sergeants,* 628 F.2d 796, 798 (2d Cir. 1980), *cert. denied,* 450 U.S. 980 (1981).

adjustments for seniority and veterans' credits. *See* note 6 *supra*. The size of the zones was based on a statistical computation of the likely error of measurement inherent in Exam 36-808 and was believed by the settling parties to be consistent with our discussion in *Guardians, supra*, 630 F.2d at 102-03. Accordingly, the adjustment was a proper means of insuring compliance with Title VII since, by creating a more valid method to assess the significance of test scores, it eliminated the central cause of the adverse impact, *i.e.*, the rank-ordering system, while assuring appointments on the basis of merit. In fact, the rank-ordering system permissibly could have been modified to produce a result more disadvantageous to intervenors. *See, e.g., Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra*, 630 F.2d at 104, 109 (employer may resort to random selection from within entire group that achieves a minimal passing score); *Vulcan Society of Westchester County, Inc. v. Fire Department of City of White Plains, supra*, 505 F. Supp. at 959, 964 (parties to a settlement can change a ranking exam to a general qualifying exam, *i.e.*, everyone who obtained a passing grade would be treated equally for purposes of next step in hiring process). Thus, the creation of a tiered zone system which preserves some of the results of a discriminatory test may have the least detrimental effect on the interests of non-minority candidates who obtained high test scores. These provisions are reasonable and legal.

Further, the adjustment of the rank-ordering system does not deprive intervenors of any vested property right which they had under New York law. The New York Court of Appeals has stated that a person on an eligibility list does not possess "any mandated right to appointment or any other legally protectible interest." *Cassidy v.*

Municipal Civil Service Commission, 37 N.Y.2d 526, 529 (1975). The only relevant state right intervenors possess is the right to challenge the settlement on the grounds that the manner in which it provides for appointments is unlawful, arbitrary, and capricious, or constitutes an abuse of discretion. *Burke v. Sugarman*, 35 N.Y.2d 39, 42 (1974); *Adelman v. Bahou*, 85 A.D.2d 582, 863, 446 N.Y.S.2d 500, 502-03 (3d Dep't 1981). This right interevenors exercised in the district court.

3. *Race-Conscious Promotional Appointments.*

The race-conscious appointment procedures envisaged by the settlement are not unreasonable or illegal. Recognizing that full compliance with Title VII cannot be realized until all the discriminatory effects of a challenged employment practice are erased—in this case until the adverse impact resulting from the disproportionate number of non-minority appointments already made is remedied—we have held that interim race-conscious selection procedures that do not have a disparate impact on any group protected by Title VII are appropriate to bring a defendant into compliance with Title VII. *Berkman v. City of New York, supra*, No. 82-7654, slip op. at 2722-23; *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 278 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra*, 630 F.2d at 108-09; *see also Regents of University of California v. Bakke, supra*, 438 U.S. at 362 (Brennan, *J.*, concurring in part and dissenting in part). Interim race-conscious selection procedures do not have a disparate impact on any protected group when (1) they mandate the appointment of mem-

bers of the plaintiff-class who are victims of the defendant's discrimination, and (2) they calculate the number of victims to be appointed—in relation to the total number of interim appointees—by reference to the percentage of the victims within the total applicant pool. *Berkman v. City of New York, supra,* No. 82-7654, slip op. at 2722-23; *Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 109, 113. Because such interim selection procedures do not go beyond the simple elimination of the challenged practice's disparate impact, they are not unlawful quotas and are justified whenever a Title VII violation has occurred. *Berkman v. City of New York, supra,* No. 82-7654, slip op. at 2723; *Association Against Discrimination in Employment, Inc. v. City of Bridgeport, supra,* 647 F.2d at 278.

The agreement's race-conscious promotional procedures are similar to the lawful remedies described above. They are interim in nature since they will end after corrective measures are implemented and will then be followed by a valid selection procedure. *See Guardians Association of New York City Police Department, Inc. v. Civil Service Commission, supra,* 630 F.2d at 110. Moreover, they do not have a disparate impact on any protected group. The agreement provides, subject to certain noted exceptions, that future promotions will be offered first to minority candidates until the ratio of minority appointments equals 21%, a percentage approximately equal to the percentage of minority candidates on the eligibility list. Because the appointment of only 32 minority candidates is required to reach the 21% goal, *see* note 9 *supra,* the non-minorities on the list will not be unduly barred from promotion. The burden on non-minority candidates is further lessened by the fact that, regardless

of the 21% goal, no minority candidate in a lower zone will receive an appointment until all candidates in the highest zone have been offered appointments. After the 21% goal is reached, minority candidates will receive appointments in a ratio of 1 to 4, reflecting the percentage of minorities on the eligibility list. Accordingly, because for a period only members of the plaintiff class will be offered appointments, and because the ratio of minority appointments will not exceed the minority representation of the total candidates pool, the agreement's race-conscious remedies are substantially related to and do not go beyond the goal of eliminating Exam 36-808's adverse impact.

4. *The Duration of the Eligibility List.*

We turn finally to the contention presented by *amici curiae* that the portion of the settlement which sets no discernible limit on the life of Exam 36-808's eligibility list unnecessarily trammels the interests of all DOCS employees, regardless of race, not on the current eligibility list but eligible to take the next examination for promotion to Correction Lieutenant. Specifically, the agreement calls for the list to continue "until every eligible on the 36-808 List has been offered an appointment and has been afforded a reasonable opportunity to either accept or decline." Settlement Agreement art. VI(5)(c). Judge Griesa, noting that "[n]one of the parties has offered any evidence as to what length of time will be involved in this," 552 F. Supp. at 670, did not reach any conclusion as to the probable life of the list.[20] On appeal,

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20 The issue of the eligibility list's duration was not argued in the hearings before Judge Griesa as no one representing the rights of employees not on the list participated in the hearings.

all the parties have offered speculative and often contradictory estimates of the anticipated life of the list, with 3 or 4 years at the low end of the range and 16 years at the high end.

The argument of those employees represented by *amici* is grounded on New York Civil Service Law § 56, which limits the duration of an eligibility list to four years. *See* N.Y. Civ. Serv. Law § 56 (McKinney 1983). New York's purpose in placing a cap on the duration of eligibility lists is to insure that all appointments to the classified civil service be based on merit and fitness. *See* N.Y. Const. art. V, § 6. The New York Court of Appeals has stated: "As time passes, [the eligibility list's] value as a test of merit and fitness diminishes. Others may, then, be better prepared and more fit to fill a position than those who are upon the list." *Hurley v. Board of Education*, 270 N.Y. 275, 280 (1936). Although the employees represented by *amici* are not currently on any eligibility list, they may compete for promotion when they achieve the requisite qualification. *See Edgerton v. New York State Civil Service Commission*, 84 A.D.2d 881, 444 N.Y.S.2d 731 (3d Dep't 1981).[21] Accordingly, they contend that their career interests in seeking a promotion will be unnecessarily trammeled if the eligibility list is in effect more than four years. *Cf. Vulcan Society of New York City Fire Department, Inc. v. City of New York, supra*, 96 F.R.D. at 631.

While courts must be sensitive to the interests of all affected third parties before approving Title VII settle-

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21 *Edgerton v. New York State Civil Service Commission*, 84 A.D.2d 881, 444 N.Y.S.2d 731 (3d Dep't 1981), was a state Article 78 application brought by DOCS Correction Sergeants, some of whom are intervenors in this action, which successfully compelled CSC to administer Exam 36-808 on October 3, 1981.

ments, *United Steelworkers of America v. Weber, supra,* 443 U.S. at 208, we see no reason to disturb Judge Griesa's approval on this point since there is now no basis for determining whether it will take more than four years for the current eligibility list to be exhausted. However, since we treat court ordered stipulations implicating the operations of state agencies as though they are injunctions issuing from the district court, *see Pena v. New York State Division for Youth,* No. 82-7876, slip op. at 4065 (2d Cir. May 25, 1983); *see also Carson v. American Brands, Inc., supra,* 450 U.S. at 89 (Title VII class settlements are to be treated as injunctions for purposes of appeal); *Plummer v. Chemical Bank, supra,* 668 F.2d at 659 (same), employees represented by *amici* may, after a reasonable time and in light of subsequent developments, move for modification of the settlement agreement in the district court. *See United States v. Swift & Co.,* 286 U.S. 106, 114-15 (1932); *New York State Association for Retarded Children, Inc. v. Carey,* Nos. 82-7441, 82-7591, slip op. at 2763-64 (2d Cir. March 31, 1983). Because New York law allows the state to extend eligibility lists to a maximum of 4 years, *Roske v. Keyes,* 46 A.D.2d 366, 363 N.Y.S.2d 21 (2d Dep't 1974); N.Y. Civ. Serv. Law § 56 (McKinney 1983), and because the statutory period does not begin to run until a challenged list is approved by the court, *Mena v. D'Ambrose,* 44 N.Y.2d 428 (1978), a reasonable time for the consideration of any modification application will only commence four years from the date of the district court's order.

Affirmed.

Appendix B—Order of the United States Court of Appeals Denying Rehearing.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-seventh day of July, one thousand nine hundred and eighty-three.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs-Appellees,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants-Appellees,

FREDERICK E. ALTHISER, *et al.*,

Intervenors-Appellants-Appellees,

ROBERT J. MCCLAY, *et al.*,

Intervenors-Appellees-Appellants.

Nos. 82-7830
82-7874

A petition for rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for the intervenors-appellants-appellees, Frederick E. Althiser, *et al.*,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing *in banc* has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk
VICTORIA C. DALTON
by Deputy Clerk

APPENDIX C—Decision of the United States District Court, December 1, 1982.

Edward L. KIRKLAND, Joseph P. Bates, Sr., Arthur E. Suggs, each individually and on behalf of all others similarly situated, Plaintiffs,

v.

The NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES;

Thomas A. Coughlin, III, individually and in his capacity as Commissioner of the New York State Department of Correctional Services;

The New York State Civil Service Commission;

Joseph Valenti, individually and in his capacity as President of the New York State Civil Service Commission and Civil Service Commissioner;

Josephine Gambino and James McFarland, each individually and in his/her capacity as Civil Service Commissioner, Defendants.

No. 82 Civ. 0295.

United States District Court,
S.D. New York.

Dec. 1, 1982.

Motion was made to approve class action settlement in employment discrimination action. The District Court, Griesa, J., approved settlement which contained agreement to adjust present eligibility list to correct for disproportionate racial impact and provision for development of new selection procedures for promotion to correction lieutenant and correction captain after current lieutenant eligibility list had been exhausted by the New York State Department of Correctional Services.

Ordered accordingly.

1. Federal Civil Procedure ⇐1699

In suit brought on behalf of black and Hispanic correction officers challenging legality of promotional examination given for position of correction lieutenant, approval was given to class action settlement which adjusted eligibility list to correct for disproportionate racial impact and contained a provision for development of new selection procedures for promotion to correction lieutenant and correction captain after current lieutenant eligibility list had been exhausted since proponents of settlement made sufficient showing of serious questions of racial discrimination to justify remedy and settlement did not violate New York Constitution or state Civil Service Law since reorganization of the rank-order eligibility list into zones was reasonable. N.Y.Const. Art. 5, § 6; N.Y. McKinney's Civil Service Law §§ 50–52, 61.

2. Civil Rights ⇐43

Statistical showing of disproportionate racial impact creates presumption of Title VII discrimination. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

3. Civil Rights ⇐43

In Title VII action relating to employment testing, where statistical showing creates presumption of Title VII discrimination, defendants must come forward with proof that test is job related or otherwise court is obligated to render a decree in favor of plaintiffs. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

4. Federal Courts ⇐411

State law must yield to federal law in Title VII case. Civil Rights Act of 1964, § 701 et seq., as amended, 42 U.S.C.A. § 2000e et seq.

5. Constitutional Law ⇐277(2)

Position on an eligibility list is not a vested property right protected by due process. U.S.C.A. Const.Amend. 14.

NAACP Legal Defense Fund by O. Peter Sherwood, New York City, for plaintiffs.

Robert Abrams, Atty. Gen., State of N.Y. by Barbara B. Butler, New York City, for defendants.

Rowley, Forrest & O'Donnell by Richard R. Rowley, Albany, N.Y., for Althiser intervenors.

Beck, Halberg & Williamson by Herbert B. Halberg, New York City, for McClay intervenors.

OPINION

GRIESA, District Judge.

This is a motion under Fed.R.Civ.P. 23(e) to approve a class action settlement. The motion is granted.

The Action

The suit is brought on behalf of black and hispanic Correction Sergeants in the New York State Department of Correctional Services, challenging the legality of Promotional Examination No. 36–808, given for the position of Correction Lieutenant (G–20) on October 3, 1981. The claim is that the test and the resulting eligibility list are racially discriminatory in violation of the Fourteenth Amendment of the United States Constitution, 42 U.S.C. §§ 1981 and 1983, and Titles VI and VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* The complaint seeks declaratory and injunctive relief, as well as damages in the form of back pay for alleged past discrimination.

Defendants are officials in the New York Department of Correctional Services and the New York Civil Service Commission. They have answered denying any unlawful discrimination, and asserting the validity of the test and the resulting eligibility list.

The action was commenced on January 15, 1982. After discovery, followed by extensive negotiations, a settlement agreement was entered into in August 1982. It is this agreement which is the subject of the present application.

Notice of the proposed settlement was properly given. A hearing was scheduled for September 29, 1982. By the time of that hearing no objections were received from any members of the class. However, over 200 written objections were received from non-class members—*i.e.*, white correctional officers. In addition, two groups of white correctional officers, each represented by counsel, moved to formally intervene in the action. On September 29, 1982 the court granted the motions to intervene, specifying that the interventions would be solely for the purpose of objecting to the proposed settlement.

Additional hearings were held on October 4 and October 14, 1982. Briefs have been received from both the plaintiffs and the original defendants in support of the proposed settlement. The intervenors have submitted briefs in opposition.

On November 9, 1982 the court entered an order approving the settlement. The order stated the court's conclusion that the settlement is fair, reasonable and lawful in all respects, and that the objections to the settlement, including the claims of constitutional defects, are without merit. The order stated that an appropriate opinion would be issued in due course.

Factual Background

The present case must be considered in the context of a prior action brought by Kirkland et al., in which they challenged the promotional examination for the position of Correction Sergeant. The action was commenced in 1973 in this court, and was tried before Judge Lasker, who found that the examination was racially discriminatory. *Kirkland v. New York State Department of Correctional Services,* 374 F.Supp. 1361 (S.D.N.Y.1974). Judge Lasker directed that the State institute a new selection procedure for Correction Sergeant, and in addition imposed a permanent hiring ratio for minorities. Pending the institution of this procedure, he required an interim ratio.

On appeal, the Second Circuit affirmed the finding of the unconstitutionality of the examination, but reversed the imposition of a permanent minority ratio. It should be noted, however, that the Court of Appeals upheld the *interim ratio.*

"The court directed that at least one out of four persons so promoted must be members of the plaintiff class. Since this portion of the decree is interim in nature, does not mandate the making of any promotions, does not disregard an existing civil service eligibility list, and since its benefits are limited to the members of plaintiff's class, we affirm it as not being

an abuse of the District Court's discretion." *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 429–30 (2d Cir.1975).

The Court of Appeals remanded for the development of a non-discriminatory testing procedure without the use of a permanent ratio.

[1] Following the remand, the State developed a new testing procedure consisting of two parts: *first*, a written test primarily designed to assess verbal skills; *second*, performance ratings made by the applicant's departmental superiors. The written test was administered. The resulting scores of the minority applicants were, on the average, somewhat lower than the scores of the white applicants, based on a "criterion-validation study." As a consequence, the Corrections Department re-scored the tests by adding 250 points for every minority applicant.

In further proceedings before Judge Lasker, a group of white correctional officers was permitted to intervene to challenge the 250-point adjustment. Judge Lasker granted summary judgment in favor of the original parties to the action and against the intervenors. The Court of Appeals affirmed. *Kirkland v. New York State Department of Correctional Services*, 628 F.2d 796 (2d Cir.), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1515, 67 L.Ed.2d 815 (1981). The Court held that the 250-point adjustment was not illegal as creating a "quota"

since it did not "require that a minimum number of sergeant appointments be given to any members of a minority group." 628 F.2d at 798.

In the previous Court of Appeals opinion, there was a dictum criticizing what was referred to as "bumping" from a preferred position on an eligibility list because of racial considerations. 520 F.2d at 429. In the second Court of Appeals opinion, the Court explained that this earlier discussion related solely to strict racial quotas. The Court stated that the steps taken by the Department of Corrections in connection with the revised selection procedure

> "... do not constitute de jure or de facto quotas. This program does not bump white candidates because of their race but rather reranks their predicted performance as estimated by the combined test score and job performance ratings." 628 F.2d at 798.

Finally, the Court gave its overall approval to all phases of relief as finally arrived at after the remand, "including quotas in interim appointments." *Id.*

The promotional examination for Correction Lieutenant, which is at issue in the present case, was administered in October 1981. The State relied strictly on a written test, and did not establish any procedure for performance ratings, as had been done in the reformed selection for sergeants. The results of the test for minority and non-minority applicants were as follows:

	Minority	Non-Minority
Took Test	169 (22.9%)	570
Passed Test	148 (22.0%)	527

Plaintiffs in the present case do not contend that the examination involves racial discrimination on the basis of *pass rate*. The problem raised by plaintiffs relates to the rank-ordering based upon the relative scores of the applicants who passed the test. Plaintiffs have provided the following list, which shows the racial makeup of various groups on the eligibility list.

Position No.	% Min.	No. Min.	No. Non-Min.
1–107	5.6	6	101
108–229	9.8	12	110
230–298	16.0	11	58
299–416	19.5	23	95
417–525	29.4	32	77
526–619	33.0	31	63
620–672	47.2	25	28

Appointments from the eligibility list commenced in early January 1982. As of July 28, 1982, 202 non-minority applicants had been promoted to Lieutenant from the list, and only 20 minority applicants (9.0%).

Plaintiffs contend that the total 222 applicants promoted as of July 28, 1982 is a statistically significant sample to indicate whether or not the rank-order list improperly discriminates on a racial basis. Plaintiffs' expert calculates the discrepancy between minority and non-minority appointments as of July 28, 1982 to be statistically significant to level of 5.86 standard deviations (exceeding the .001 level of confidence). In *Castaneda v. Partida*, 430 U.S.

482, 496, n. 17, 97 S.Ct. 1272, 1281, n. 17, 51 L.Ed.2d 498 (1977), the Supreme Court commented on the use of statistics in determining whether a plaintiff, complaining about racial discrimination under Title VII, has made out a *prima facie* case. The Court stated that, "if the difference between the expected value [from a random selection] and the observed number is greater than two or three standard deviations," a *prima facie* case is established.

The same trend continued after July 28, 1982. Counsel for intervenors represented that, as of September 29, 1982, 225 appointments to Lieutenant had been made, of which 21 (about 9%) were minority applicants.

The Settlement Agreement

The settlement agreement contains two basic elements: *first*, measures to adjust the present eligibility list to correct for disproportionate racial impact; *second*, provision for the development of new selection procedures for promotion to Correction Lieutenant and Correction Captain after the current Lieutenant eligibility list has been exhausted.

Current Eligibility List

It is agreed that the current eligibility list will be used to fill vacancies in the position of Lieutenant until the list is exhausted. None of the parties has offered any evidence as to what length of time will be involved in this. It is further agreed

that all applicants who have already been appointed from the list will retain these appointments.

The system of rank-order for further appointments will be changed under the agreement. The persons who passed the test are to be grouped in three "zones" according to their scores (adjusted for the usual veterans and longevity credits). This grouping includes all those who have passed the test, including those who have already received appointments. The following table shows the makeup of the zones:

Zone	Score Range	Rank Range	No. in Zone
1	82.5 +	1–247	233
2	78.0–82.0	248–525	286
3	73.0–77.5	526–672	153

The 225 appointments which had been made as of September 29, 1982 were mostly from Zone 1. For reasons that will appear from the discussion below, there are circumstances which result in promotions going to applicants in other than strict rank order.

For future promotions from the revised eligibility list, the procedure will be as follows.[1] All candidates within a particular zone will be treated as equally qualified, and a rank-order list will be made up based

1. The basic features are contained in the settlement agreement. However, certain further details described herein were provided by counsel at the hearing of September 29, 1982 and are contained in the minutes thereof.

upon a random assignment. Offers of promotion will be made first to those in the higher ranking zone. Such offers will be made first to minority applicants until the total percentage of minority appointees to all appointees reaches 21%, with the qualification that, notwithstanding the 21% target ratio, no minority applicant in a lower ranking zone will receive an offer until all applicants, both minority and non-minority, in the higher ranking zone or zones have received offers. Once the 21% has been attained, the offers will be made in a ratio of 4 to 1, non-minority to minority.

When a vacancy occurs at a given facility, it will be offered only to those applicants who have designated a willingness to accept appointment at that facility, or in the same general location. If a vacancy occurs at a facility or location which no minority applicant has designated, the position will be offered to non-minority applicants. Thus, depending on where a particular vacancy occurs, non-minority applicants may be chosen despite the fact that the 21% target ratio has not been achieved.

An indication of the number of minority promotions that may be necessary to achieve the 21% target ratio can be obtained by starting with the 225 appointments made as of September 29, 1982 (204 non-minority and 21 minority). If 32 minority appointments are made, the total appointments would be 257 of which 53 (or 21%) would be minority.

New Selection Procedures Following Exhaustion of Current Eligibility List

The settlement agreement requires the parties to cooperate in the development of new selection procedures for promotion to Lieutenant and Captain, to be used after the current eligibility list is exhausted. The objective is to avoid unfavorable racial impact and ensure equal opportunity of advancement for both minority and non-minority personnel. The settlement agreement contains an express undertaking to attempt the development of devices other than written tests as components of the new selection procedure. The agreement provides for a number of detailed steps to ensure the validity of the selection procedure.

Reasonableness and Legality of Settlement

The settlement agreement in the present case is a logical outcome of the prior *Kirkland* litigation involving the procedure for promotion to Correction Sergeant. The Court of Appeals in that case approved an interim ratio for minority appointments designed to deal with the specific problems of racial discrimination arising from the test in question. Also, on the remand following the first Court of Appeals opinion, the State recognized that the rank-order list created by the new testing procedure still raised problems of racial discrimination, and the State voluntarily adjusted the scores of the minority applicants to improve their position on the list. In its second opinion, the

Court of Appeals upheld this adjustment. Another feature of the Sergeants' litigation was the development of new selection procedures departing from sole reliance on a written examination. This was also approved by the Court of Appeals.

Thus, the basic features of the settlement agreement in the present case find clear precedent in the Sergeants' litigation—departure from a strict rank-order eligibility list based on test results; an interim ratio for minority promotional appointments; and development for the long term of a new selection procedure.

The present settlement agreement is not only justified by legal precedent, but is inherently reasonable and sound as a matter of policy. The benefits to plaintiff class of minority applicants inevitably result in some detriment to non-minority correctional officers competing for promotion to the rank of Lieutenant. However, the benefits to plaintiff class are modest and are carefully tailored to the precise problem raised by them in the litigation. By the same token, the detriment to the non-minority applicants is also modest and is in fact considerably less than what might have occurred if plaintiffs had pressed their litigation to the end and not agreed to a settlement.

The first point to be made in this regard is that the strict rank-order list originally resulting from the Lieutenant test involved differentiations among the candidates

which were altogether arbitrary. It is recognized as an obvious fact that slight differences in the scores achieved mean virtually nothing as far as the merits of the candidates respecting performance of duty. It is equally obvious that ranking according to zones, as will be done under the settlement agreement, will involve a far more realistic recognition of what the test scores mean regarding the actual merits of the candidates. It is, of course, true that there is serious doubt about the entire concept of a written test as the criterion for the ranking of candidates for positions such as the one in question. However, the zone system is at least a step towards a realistic solution to that problem. If the settlement agreement provided only for the grouping of the applicants in zones, and the ranking within the zones by random selection, the settlement agreement would involve a truly "color-blind" rank order list.

However, if the settlement agreement went no farther than this, it would provide no remedy for the disproportionate number of non-minority applicants in the promotions which have already been made. It should be noted that, if the litigation had proceeded to its conclusion and plaintiffs had prevailed, all of those appointments could well have been declared null and void. The settlement agreement takes a much more modest approach. All of the appointments thus far made (225 as of September 29) will remain in effect. What is provided in the settlement agreement to adjust the

balance is that, subject to certain details previously noted, future appointments will be offered first to minority applicants until the ratio of minority appointments will equal 21% of the whole. This does not deny promotion to any of the remaining non-minority applicants. At most, it postpones the promotion of such applicants initially until approximately 30 minority applicants have received appointments. After the target ratio is accomplished, non-minority applicants will receive four appointments for every minority appointment. This is roughly the racial composition of those who passed the test. It is hardly a substantial detriment to the non-minorities.

With regard to the development of new selection procedures following the exhaustion of the current eligibility list, the settlement agreement is eminently sound. It envisages departure from the sole use of the written test and the development of racially neutral selection procedures better designed to relate to the merits of candidates in regard to job performance.

The two principal contentions of the objectors in opposition to the settlement agreement are as follows:

First, they contend that, before any affirmative relief may be granted to plaintiff class, there must be a full trial regarding the issue of the racially discriminatory nature of the examination in question and the eligibility list. This means, according to the objectors, not

merely a statistical showing of racially disproportionate impact, but also a trial and judicial determination on the question of the job-related nature of the examination. The objectors urge that, even if the State does not desire to prove the job-relatedness of the examination, the objectors themselves should have the opportunity to do so.[2]

Second, even if the record would justify the granting of some relief to plaintiff class by way of settlement, the racial preferences granted to the minority applicants under the settlement agreement violate both the Federal Constitution and the state Civil Service Law.

Proper Basis for Settlement

The objectors' first contention flies in the face of an age-old judicial policy favoring voluntary settlement of litigation. The courts have specifically espoused this policy

2. Objectors also argue in their briefs that in addition to proof of disproportionate impact and a lack of job-relatedness of the test in question, there must be a demonstration of "past egregious racial discrimination" (*e.g.*, purposeful discrimination) before affirmative relief may be approved in a Title VII context, relying on *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). The citation of the latter case is misplaced, since it dealt with standards under the Equal Protection Clause. The court stated there that the requisite showing under Title VII involved a lesser standard than that required under the "constitutional rule." 426 U.S. at 238–39, 96 S.Ct. at 2047.

in connection with Title VII actions. Indeed, the Supreme Court made clear in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S.Ct. 1011, 1017, 39 L.Ed.2d 147 (1974), that voluntary settlements of Title VII actions are "the preferred means for achieving [the statutory] goals . . . [of] assur[ing] equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race." In this regard, the Supreme Court noted recently that a refusal to approve a proposed settlement decree under Title VII is an appealable order because such refusal undermines a fundamental policy underlying Title VII by denying the parties the opportunity to compromise their claims and to obtain prompt injunctive relief contained in the settlement agreement they have negotiated. *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n. 14, 101 S.Ct. 993, 998, n. 14, 67 L.Ed.2d 59 (1981).

The courts have stated that the settlement of a Title VII action is entitled to a presumption of validity when objections are made to such a settlement. *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir.1981) (en banc); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980). In Title VII class actions, it has been said that there is a "strong presumption in favor of settlement." *Guardians Association of New York City v. Civil Service Commission*, 527 F.Supp. 751, 757 (S.D. N.Y.1981).[3]

3. The litigation by the Guardians Association occurred in several stages. The above opinion will hereafter be referred to as "*Guardians II.*"

The objectors rely mainly on two authorities as supporting their first contention. They cite *Patterson v. Newspaper and Mail Deliverers' Union of New York*, 384 F.Supp. 585 (S.D.N.Y.1974).[4] This was a Title VII action (although not a testing case) which was settled after four weeks of trial. Judge Pierce handed down an opinion approving the settlement. The objectors in the present case rely on the following statement from the opinion:

> "[A]lthough the court is of the opinion that even at this late stage public policy is served by an agreement rather than an adjudication, a more searching discussion of the merits is warranted. In fact, the state of law in this circuit may require certain findings of fact to support affirmative action in a Title VII case even where it is resolved by settlement." 384 F.Supp. at 588.

There is nothing whatever in this statement which indicates that a Title VII action cannot be settled before trial, or that in a Title VII testing case there must be trial and judicial findings on all phases of the merits of the case before the action can be settled. Judge Pierce was simply making appropriate findings regarding the reasonableness and legality of the settlement before him, since objections were posed to that settlement. Since Judge Pierce had the benefit of a record of four weeks of trial, he naturally availed himself of that record to make detailed findings.

4. *Aff'd* 514 F.2d 767 (2d Cir.), *cert. denied*, 427 U.S. 911, 96 S.Ct. 3198, 49 L.Ed.2d 1203 (1976).

The other authority cited by the objectors is *United States v. City of Miami*, 614 F.2d 1322 (5th Cir.1980), *rev'd in part*, 664 F.2d 435 (5th Cir.1981) (en banc). In the panel decision, 614 F.2d 1322, the court of appeals affirmed the district court's approval of a consent decree in a Title VII action brought by the Government. This consent decree purported to bind a labor union, which was named as a defendant in the action and which had not agreed to the consent decree. The case was reheard en banc, resulting in a ruling that the union could not be bound by the consent decree insofar as the decree adversely affected the union's rights under a collective bargaining agreement. 664 F.2d at 442.

City of Miami is of little assistance to the objectors in the present case. *City of Miami* stands for the obvious proposition that a consent decree cannot bind a defendant who does not consent. In the present case all the defendants in the action have agreed to the settlement. The objections come from persons who were not named as defendants, but who claim that they will be affected by the relief provided for in the settlement agreement. This presents a different problem from what was dealt with in the holding in *City of Miami*.

It is of interest to note that the plurality opinion in *City of Miami* contains a dictum referring to the latter problem—the question of the adverse effect of a consent decree or settlement upon persons not parties to the litigation. This dictum recognizes

the power of a court to approve such a consent decree or settlement as long as the court gives due consideration to such adverse effect and finds, on balance, that "the effect on them is neither unreasonable nor proscribed." 664 F.2d at 441.

Although settlements of Title VII litigation are favored and are accorded a presumption of validity against objections, nevertheless it must be recognized that, to the extent that such settlements accord preferences to minorities, there will usually be some detriment to non-minorities. These non-minorities are often not parties to the litigation. Consequently, a settlement of a Title VII class action may well raise issues of a broader nature than are involved in the usual class action settlement, where basically only the immediate parties are affected, and where the main consideration of the court in assessing the settlement is adequacy to the members of the class.

In the present case, regardless of how moderate is the preference given to the minority members of plaintiff class, and how modest is the detriment to the non-minority correction officers, there is *some* detriment to the latter. Consequently, it is necessary that there be a reasonable basis for imposing such detriment.

Clearly, if there were no bona fide question of racial discrimination, and if nothing were being done but to provide a gratuitous preference for blacks and hispanics, there

would be no basis for court approval of such an arrangement under Title VII. Certainly there must be a showing in some form that there is at least a serious claim of racial discrimination against the plaintiff class, before a settlement can be approved which adversely affects non-minority persons.

[2, 3] Here, plaintiff class has made such a showing. Plaintiffs have established a *prima facie* case of Title VII employment discrimination through their uncontested statistical demonstration of disproportionate racial impact respecting the eligibility list. Such a statistical showing creates a "presumption of Title VII discrimination." *Guardians Association of New York City v. Civil Service Commission*, 630 F.2d 79, 88 (2d Cir.), *cert. denied*, 452 U.S. 940, 101 S.Ct. 3083, 69 L.Ed.2d 954 (1981) ("*Guardians I*").[5] In a Title VII action relating to employment testing, where such a showing has been made, the defendants must come forward with proof that the test is job-related, or otherwise the court is obligated to render a decree in favor of the plaintiffs. *Guardians I, supra*, at 88; *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253–54, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981).

In the present case defendants have chosen not to litigate the job-relatedness of the test and the eligibility list, but have chosen the path of voluntary settlement. There is ample authority in favor of settlement of Title VII class actions under these circumstances.

5. *See* footnote 3 *supra*.

The action of the State in settling the present case is, in principle, a voluntary adoption of an affirmative action plan. Therefore certain discussion in *Regents of University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), is relevant. There the Supreme Court held that a permanent racial quota in a state university system should be struck down, but also held that the system is not constitutionally foreclosed from instituting certain kinds of racial considerations and preferences in admissions procedures. 438 U.S. at 320, 98 S.Ct. at 2763. In their concurring and dissenting opinion, Justices Brennan, Marshall, White and Blackmun made the following statement (such statement being part of their concurrence):

> "Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And, our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects rather than a prerequisite to action." 438 U.S. at 364, 98 S.Ct. at 2786.

In *United States v. City of Alexandria*, 614 F.2d 1358 (5th Cir.1980), the court of appeals approved a consent decree in a Title

VII case, and rejected the argument that, before such a decree could be entered, the employer must first be adjudged guilty of discriminatory employment practices. The court stated:

> "We have never heard of any doctrine of law which requires a defendant to put on a defense to rebut a prima facie case.... The defendant may simply claim that the plaintiff's case is insufficient, and choose to present no evidence. If this had occurred in the instant case or if the evidence presented by the defendants had been insufficient to rebut the government's case, the trial court would have been obligated to enter a decree against the defendants." 614 F.2d at 1364.

In *Prate v. Freedman*, 583 F.2d 42 (2d Cir.1978), the Second Circuit dealt with a collateral attack made upon a Title VII consent judgment by persons who were not parties to the action but who were affected by the judgment. These parties argued that a plan for preferential minority hiring in the judgment was unsupported by a sufficient showing of unlawful discrimination. The court rejected this contention, holding that admission of "disproportionate impact unrebutted by any suggestion that the contested practices were 'job-related' amounted to an admission of unlawful discrimination for purposes of Title VII." 583 F.2d at 47. Moreover, the court noted: "Our decision in *United States v. Wood, Wire & Metal Lathers Union* [471 F.2d 408, 413 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, ...

L.Ed.2d 398 (1973)] foreclosed the argument that preferential hiring relief may only be based on a formal finding of past discrimination made after an evidentiary hearing." *Id.* at 47, n. 4.

In *Vulcan Society v. Fire Department of White Plains*, 505 F.Supp. 955 (S.D.N.Y. 1981), Judge Sofaer approved a settlement of a Title VII action. A portion of that settlement involved hiring procedures for the New Rochelle fire department. Judge Sofaer noted the existence of a *prima facie* case in favor of plaintiffs on the basis of uncontested statistics, and stated that the "racial imbalance ... is substantial enough to justify the voluntary adoption of a hiring ratio designed to eliminate the disparity." 505 F.Supp. at 962. Similarly, in *Guardians II*, 527 F.Supp. 751, 757 (S.D.N.Y.1981), Judge Carter approved a settlement of a Title VII testing action on the basis that plaintiffs had established a *prima facie* case and there had been bona fide arm's-length bargaining. The elements found in the *Vulcan* and *Guardians* cases are present in the case at bar.

Thus, on the basis of both reasoning and precedent, it is clear that the objectors cannot force the defendants in this action to a trial of plaintiffs' claims, nor do the objectors have any right to defend these claims themselves. The proponents of the settlement agreement have made a sufficient showing of serious questions of racial discrimination under Title VII to justify a remedy which affords carefully measured employment preferences to plaintiff class.

Lawfulness of Remedy

The objectors contend that the proposed settlement violates both the New York Constitution and the state Civil Service Law by departing from the principle that promotions in the state Civil Service are to be made by competitive examination.

Both the New York Constitution and the Civil Service law require that promotions shall be according to merit and fitness, to be ascertained, as far as practicable, by competitive examination. *See* New York State Constitution, Art. V, § 6; Civil Service Law §§ 50–52, 61. However, neither the constitution nor the statute specifies any particular method of examination or grading. *See Matter of Katz v. Hoberman*, 28 N.Y.2d 530, 532, 319 N.Y.S.2d 73, 267 N.E.2d 886, *cert. denied*, 404 U.S. 881, 92 S.Ct. 203, 213, 30 L.Ed.2d 163 (1971); *Matter of Mitchell v. Poston*, 41 A.D.2d 886, 342 N.Y.S.2d 482 (4th Dep't 1973). The reorganization of the rank-order eligibility list in the present case into zones is a reasonable step on the part of the Civil Service Commission to make the list accord with merit and to have arbitrary and unfair rankings eliminated. *See Matter of Sullivan v. Taylor*, 285 A.D. 638, 639, 140 N.Y.S.2d 58 (1st Dep't 1955).

[4] Insofar as the 21% and one-to-four ratios are concerned, it is unnecessary to determine whether they would be in accordance with state law. It is clear that state law must yield to federal law in a Title VII case. *See Guardians I*, 630 F.2d at 104–5.

This brings us to the question of whether the ratios provided for in the settlement agreement in the present case are valid under federal law. It is clear that they are.

[5] The objectors contend that their positions on the original rank-order eligibility list constitute vested property rights, which would be taken away without due process of law by the settlement agreement. This argument is wholly without merit. A position on an eligibility list is not a property right. The New York Court of Appeals has held this to be so under both the New York and Federal Constitutions. *Cassidy v. Municipal Civil Service*, 37 N.Y.2d 526, 529, 375 N.Y.S.2d 300, 337 N.E.2d 752 (1975).

The objectors further contend that the 21% and four-to-one ratios are "quotas" favoring the minority applicants, which violate the equal protection rights of the non-minority applicants. This argument is also without merit.

A number of decisions, some of them cited by the objectors, condemn the use of racial quotas except under particular circumstances. *See, e.g., Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427–30 (2d Cir.1975); *Guardians I*, 630 F.2d at 108–9. It is not necessary here to engage in any full discussion of what it is that constitutes an unlawful quota. The essential point, for present purposes, is that the settlement agreement in this case *is not* such a quota. The authorities leave no doubt about this.

At the outset, it is of interest that the Second Circuit has specifically recognized the arbitrary nature of a strict rank-order eligibility list based on a written test. In the course of its opinion in *Guardians I*, the court discussed what the City of New York could have lawfully done in departing from such a rank-order list:

> "[T]he employer can acknowledge his inability to justify rank-ordering and resort to random selection from within the entire group that achieves a properly determined passing score, or some segment of the passing group shown to be appropriate.... Since each of the scores between 94 and 97 was achieved by more than 2,000 candidates, and since each training class can accommodate slightly more than 400 candidates, the test scores provide no basis for selecting from among candidates at each of these scoring levels." 630 F.2d at 104.

It seems obvious that, in the present case, the State has the power to reorganize the rank-order list in question by use of the zones as proposed. As described earlier, if the settlement agreement went no farther, this would be the basis for a truly color-blind selection process. However, the settlement does go farther, and provides for the 21% and one-to-four ratios.

The cases fully support these ratios, and show that they are not unlawful quotas. As already noted, the first court of appeals

opinion in the *Kirkland* sergeants case approved interim minority ratios, while disapproving a permanent quota. *Kirkland, supra*, 520 F.2d at 429–30.

In *Association Against Discrimination v. City of Bridgeport*, 647 F.2d 256 (2d Cir. 1981), the court approved, with modifications, a remedy in a Title VII case in which 102 firefighter positions were to be offered to minority applicants ahead of non-minority applicants. The court termed this a "hiring goal" rather than a "quota." For one thing, the remedy was interim rather than permanent in nature. In *Guardians I* the court approved a minority hiring ratio. The court again dealt with the concept of an interim remedy versus a permanent one and defined "interim" as "the time period between the date of a decree and the subsequent use of a valid selection procedure." 630 F.2d at 110. The court stated that it is an appropriate interim remedy under Title VII to provide for a hiring preference "reflecting the minority ratio of the applicant pool or the relevant work force." 630 F.2d at 109. The settlement agreement in the present case provides for reasonable hiring goals on an interim basis within the meaning of these decisions.

Another feature of a valid ratio or hiring goal, as defined in this circuit, is that it is tailored to the specific discrimination claims of members of the plaintiff class, and does not establish broader-ranging benefits to minority applicants in general, and corresponding detriment to non-minorities.

Kirkland, supra, 520 F.2d at 430. This description fits precisely the settlement agreement in the present case.

The above analysis is consistent with the Supreme Court's decision in *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in respect to the legality of voluntary affirmative action plans—particularly as to the permissible effects on non-minority employees. The Court stated that the plan in that case did not "unnecessarily trammel the interests of white employees," because it did not require the discharge of white workers; it did not create an absolute bar to their advancement; and it was a temporary measure. Further, it was not intended to maintain racial balance but simply to eliminate a racial imbalance. 443 U.S. at 208, 99 S.Ct. at 2729.

These characteristics are present in the case at bar.

Other Contentions of Objectors

Various contentions have been made by the objectors in oral argument and in their written submissions. The ones that have been dealt with at length in this opinion appear to be their principal contentions, although it must be said that the delineation and articulation of points by the objectors was not crystal clear.

All of the points made by the objectors have been carefully considered. None of them has merit.

Conclusion

For the foregoing reasons, the settlement agreement is approved and the objections thereto are overruled.

Appendix D—Order of United States District Court, Dated November 9, 1982.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

v.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

82 Civ. 0295

GRIESA, J.

Plaintiffs and defendants have applied for approval of a Stipulation of Settlement of this class action, pursuant to Fed. R. Civ. P. 23(e). No objections have been received from any members of the class. However, objections have been received from numerous other parties claiming to be affected by the terms of the settlement. In addition, certain parties claiming to be affected have formally intervened and have appeared by counsel.

The court has considered the various arguments in favor of the settlement and the objections thereto. The court finds that the Stipulation of Settlement is fair, reasonable and lawful in all respects, and finds that the objections to the settlement, including the claims of constitutional defects, are without merit.

An appropriate opinion will be issued by the court in due course.

The Stipulation of Settlement is hereby approved.

So ordered.

Dated: New York, New York
November 9, 1982

THOMAS P. GRIESA
U.S.D.J.

APPENDIX E—Ruling of the United States District Court, September 29, 1982.

The Court: All right, the ruling is as follows:

The application to intervene by the clients of Rowley, Forrest & O'Donnell is granted.

I won't give the names, but we will arrange for an orderly and simple form of document to list the names of those intervenors.

To the extent that the clients of Mr. Beck and Mr. Halberg are different from the clients of Rowley, Forrest and O'Donnell—I'm sorry. Let me start again. We also have an application to intervene by clients of Beck, Halberg & Williamson. That application to intervene is granted.

Those two firms are to file with the Court a document consisting of nothing more than an affidavit from a partner of the law firm in each case, with the caption of this case, and there will be a list of the clients that are represented and who are intervening. The list should be coordinated, so that there is not duplication. I'm sure that can be arranged.

Now, the caption of the case will be amended to simply —I don't think the caption in the case needs to be amended at all. The caption will remain the same. The intervenors will be noted for the record, and that will be abundantly clear.

There are the following conditions imposed on the intervention: And I am considering this as a permissive intervention under Rule 24(b) of the Rules of Civil Procedure.

I am imposing certain conditions on the intervention for the following reasons:

This action has not been pending an inordinately long time, since it was commenced in January of 1982. And under certain circumstances, there would really be no problem of delay or timing, as far as an intervention in September of the year, nine or ten months after the filing of the action. However, in this case, some very important steps have been taken.

The parties to the action, as originally commenced, have been able, through hard work, careful thought and extensive negotiation, to reach past and get past the point of finding any necessity for a trial of the issues here. I phrase it that way, because, obviously, there has been no trial, and we know there is a settlement that's proposed. But I wanted to try to express the concept that there was a step of significance taken in deciding, on the basis of their knowledge of the issues and the facts, that there was no need for trial and that there could be a settlement.

Now, the intervenors have known about this action since its inception. And they have known, in a general way, of the progress of the talks.

Mr. Rowley was present at a meeting in court, an extensive meeting which I have referred to already, on July 14, 1982. And no action was taken by these intervenors to come in, claim discovery rights, claim the right to a trial, and no step was taken to intervene, no formal step, until the settlement was agreed to. Indeed, it is a fact, more important than the timing almost, is the fact that the intervenors stood by at a time when there should have been a decision as to whether there had to be a trial of this case or not, had to be extensive discovery or not, and they really allowed the parties to go along and believe that there could be a settlement and achieve a settlement.

Indeed, Mr. Rowley was in court for an extensive meeting on July 14, as I said. And my notes show unequivocally that he was very favorable to the idea of a settlement. He agreed to cooperate in achieving the settlement, and we all left that meeting believing that there was a settlement acquiesced in by Mr. Rowley, except for some details that could be easily worked out.

That was not the result of an incompetence in the mentality of everyone there aside from Mr. Rowley. Mr. Rowley led us to believe that this was, indeed, the case.

Now, Mr. Rowley, as is his right and his clients' right, has changed—they have changed their mind. Well, they weren't bound by anything said on July 14. But the point is, all the circumstances are such that it would be a deprivation of justice to the original plaintiffs and defendants in this action to allow an intervention which would simply start the action afresh and require discovery, trial of all the issues, and so forth.

There is also a serious question as to whether the intervenors would have standing to require the kind of trial of all the issues which Mr. Rowley now suggests. And I am not making a ruling. I am just saying there is a serious question.

Certainly, the plaintiffs here allege a minority class. Those plaintiffs have a right to sue the State authorities and to claim that the State authorities have imposed invalid and unconstitutional testing procedures. Whether in this action a group of white correction officers can come in and intervene to defend the test in a trial,—maybe they've got that right, maybe they don't—I really don't know. I think it presents a substantial issue.

But be that as it may, it is too late to start that kind of a procedure.

There is another point which I mentioned in the discussion, and that is, there is, judging by the conduct of the in-

tervenors and their counsel, there is a very serious risk here of using the litigation process to delay for delay's sake. There has been an outlandish amount of paperwork in connection with opposition to the settlement, both in this court and the Federal Court of Appeals and in State court. And it is enough to warn anybody who observes it of the danger of obstructive litigation tactics.

Timing is important here. It's important to everyone. The mechanism of the appointment of lieutenants in the Correction system is now going on. And it is this mechanism which is objected to. If the disposition of this litigation can be delayed for months or a year or more, this, in itself, achieves an important goal of the intervenors. They should not, and will not, be permitted to achieve any goal by delay for delay's sake.

So all of these circumstances lead me to rule that, on the conditions for intervention, the intervenors are permitted to intervene for the sole purpose of objecting to the settlement, and all proceedings, all hearings, all filing of papers will be solely directed to the question of the appropriateness of that settlement and the question of whether the Court should or should not approve it.

Moreover, there has to be a limit, and there will have to be regulations and some control, on the conduct of the intervenors in this intervention. And I want to let everybody know that the Court is available on short notice for conference on any and all points. And in view of that, the intervenors are directed that no papers will be filed in this court of any nature whatever until and unless a conference has been held with the Court in advance of any proposal to file papers. The exception, of course, are the papers I have just directed, listing the names of the intervenors.

We will have a conference early next week, at which we will plan the issues to be discussed and litigated in connection with the intervention. We will plan and schedule the

filing of any papers. And all of this proceeding will be taken expeditiously according to a schedule established by the Court. And all of this will be designed to make it possible for the Court to decide at a very early date whether it does or does not include the settlement.

Thank you very much.

(Recess)

The Court: Is there anything else, briefly? Then we will suspend.

Mr. Rowley: Your Honor, I just wanted to move that you reconsider your ruling, and instead direct an unlimited intervention, and place this case on a scheduling order. order.

We represented to the Court and to the parties back in July that we would not delay a trial. We will not—I would waive any further examination of the two individuals that have been examined. And if the Court wants to set this case down for a trial on the first of December, the first of January, allowing very short time for preliminaries, that, we would have no objection to—

The Court: Motion denied.

Mr. Rowley: —and we would adhere to.

The Court: Motion denied.

Mr. Sherwood: Your Honor, will we be, in terms of dates—

The Court: Can you work out the date?

Mr. Sherwood: All right, fine.

Appendix F—Settlement Agreement.

(168)

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

vs.

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

82 Civ. 295
(T.P.G.)

STIPULATION FOR SETTLEMENT AND DISMISSAL OF CLASS ACTION LITIGATION

Counsel for all the parties in the above-captioned action, agree and stipulate as follows:

I. BACKGROUND AND JURISDICTION

1. This is an employment discrimination civil rights action. Plaintiffs allege violations of the Fourteenth Amendment to the United States Constitution; 42 U.S.C. §§ 1981

and 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § *2000d, et seq.;* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* The United States District Court for the Southern District of New York Court has jurisdiction over this action as conferred by 42 U.S.C. § 2000e-5(f) and 28 U.S.C. §§ 1331, 1343.

(169) 2. Edward Kirkland and two other black employees of the New York State Department of Correctional Services began this action on January 15, 1982, on behalf of themselves and all persons similarly situated. The class is defined in the complaint as one pursuant to Rule 23(a) and (b)(2), F.R.Civ.P., consisting of "all black employees of the New York State Department of Correctional Services who sat for Examination No. 36-808 on October 3, 1981" (Complaint ¶8). Plaintiffs alleged that the defendants, the New York State Department of Correctional Services and the Civil Service Commission and their respective Commissioners, engaged in unlawful racial discrimination in the development and administration of Examination No. 36-808 and the use of the resulting eligible list to make permanent promotional appointments to the position of Correction Lieutenant. Plaintiffs also alleged that since the appointments made from the 36-808 eligible list determined who was eligible to sit for Examination No. 37-526, for the position of Correction Captain, the Captain's examination was of necessity tainted by unlawful racial discrimination.

3. The Complaint seeks an injunction against the continued use by defendants of any unlawful discriminatory employment practices based on race, together with affirmative relief, including the development of selection procedures for promotion which do not have adverse impact against blacks and (170) the implementation of steps to redress the effects of unlawful discrimination.

4. The defendants hereby acknowledge, and waive any objections to, the proper service upon them of the summons and complaint in this action, agree that the procedural requirements of Title VII, Civil Rights Act of 1964 have been satisfied and agree that the United States District Court for the Southern District of New York has personal jurisdiction over the respective parties to this Stipulation.

5. The defendants deny that they have engaged in any practice of unlawful discrimination against minorities in violation of any federal or state statutes, rules, orders, or regulations or of the Fourteenth Amendment.

6. The defendants believe they have both a moral and legal obligation to act at all times in the best interests of all citizens and employees, and, therefore need not expend public funds for litigation where there is a reasonable basis for amicable resolution, in a manner consistent with lawful affirmative action policies.

7. It is a purpose and the intent of this Stipulation to assure that minorities by reason of their race are not disadvantaged by the employment policies, procedures and practices within the New York State Department of Correctional Services, (171) and that any disadvantage to minorities which may have resulted from the use of Examination No. 36-808 is remedied as provided herein so that equal employment opportunity will be provided for all.

8. On October 3, 1981, a promotional examination for Correction Lieutenant, No. 36-808, was administered. The number of persons who applied for, took, and passed or failed the examination are:

Persons who took test and passed
(includes those subsequently disqualified)

527 white 148 minority

Persons who took test and failed

43 white 21 minority

Persons who applied and were qualified but did not appear

12 white 5 minority

Persons who applied but were not qualified

263 white 179 minority

An eligible list based on Examination No. 36-808 was certified by the Department of Civil Service. The scores reflected on the eligible list include points for seniority and veterans' credits as provided for under the Civil Service Law of New York State.

(172) The rank of a person on the eligible list was determined by his/her score and random ranking within a score. The racial/ethnic breakdown of the list in rank order is:

Rank	*White*	*Minority*
1-99	94	5
100-214	100	14
215-284	60	9
285-402	93	24
403-512	79	30
513-602	61	28
603-664	31	30

9. As of July 28, 1982, 222 appointments to the position of Correction Lieutenant had been made from the 36-808 eligible list, and of the persons so appointed, 20 are minority.

10. On January 30, 1982, promotional examination for Correction Captain, No. 37-526, was administered. Only those persons with permanent appointments as Correction Lieutenants or with certain other previous supervisory experience were eligible to take this promotional examination. No elgible list based on this examination has yet been certified.

11. The parties wish to use a method of selecting persons to be appointed to the positions of Correction Lieutenant and Correction Captain which is consistent with professionally accepted employment selection measures and which is directed towards eliminating unlawful adverse impact upon minorities which may result from the use of selection procedures for the positions (173) of Correction Lieutenant and Captain while assuring that predicated performance will be impartially measured.

12. The consent of the defendants to this Stipulation shall in no way constitute nor be construed as an admission, express or implied, by said defendants of any violation, adjudication or finding, with respect to any federal, state or local statute, rule, regulation or order, or the Fourteenth Amendment. Nor may this Stipulation or any action taken in the implementation hereof be admissible as evidence of discrimination or for any other purpose against said defendants in any other judicial or administrative proceeding or investigation, except as provided for in Article III below.

13. This Stipulation revolves in full any and all employment discrimination claims, past or present, up to and including the date of signing of this Stipulation, which claims have been or could have been advanced against defendants in connection with Examination No. 36-808 by the named plaintiffs and any class members involving alleged discrimination based on race or color, in violation of the Fourteenth Amendment, Title VII, § 1981 and § 1983, and any other applicable federal, state or local equal employment statute, rule, regulation or order seeking relief in connection therewith.

14. To the extent it may be relevant, the parties to this Stipulation are of the view that the terms of this Stipulation are consistent with the laws of the State of New York.

(174) II. CLASS ACTION STATUS AND NOTICE

1. It is appropriate for the named plaintiffs to maintain this action as a class action on behalf of all minority persons who took and passed Examination No. 36-808 and have not been appointed prior to January 30, 1982.

2. Upon submission of this Stipulation, to the United States District Court for the Southern District of New York as provided in Article III below, defendants shall give notice to the members of the Class identified herein of the terms of this Stipulation by posting the notice set forth in Attachment 1 in each of the Correctional Facilities administered by Corrections, where it may easily be observed and read by said Class members, and by mailing a copy of said notice to each eligible on the 36-808 List at the address which appears on the List.

III. APPROVAL BY THE COURT

The parties hereto shall submit this Stipulation to the United States District Court for the Southern District of

New York for approval pursuant to a hearing to be scheduled by the Court. Upon Court approval and entry of the Final Settlement Order, the Court shall enter a Final Judgment dismissing this action with prejudice. The Final Judgment and Final Settlement Order shall be binding on the parties and shall be enforceable by any member of the Class.

(175) IV. GENERAL COVENANTS

1. *Purpose.* The purpose of this Stipulation is to provide equal employment opportunity in the New York State Department of Correctional Services, and to eliminate racial discrimination that may have existed and its effects as a result of Examination No. 36-808.

2. *Non-discrimination.* The defendants, including their officers, agents, employees, successors in office, and all those acting in concert or cooperation with them or at their direction or under their control (hereinafter collectively referred to as the "defendants"), shall not engage in any act, practice, or policy which has the purpose or effect of unlawfully discriminating on the basis of race or color against any employee or applicant for employment in the New York State Department of Correctional Services.

3. *Retaliation Prohibited.* The defendants shall not discriminate or retaliate against any employee or applicant for employment in the Department of Correctional Services because he or she has opposed any unlawful employment practice or has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing relating to this action.

(176) V. FUTURE APPOINTMENTS BASED ON EXAMINATION NO. 36-808

The parties have determined that until a new examination for Correction Lieutenant is constructed and administered pursuant to Article VI of this Stipulation, appointments should be made from the eligible list based on Examination No. 36-808 in a manner that will achieve the dual goals of substantially preserving the integrity of the examination results while eliminating the adverse impact of the examination on minority candidates. The parties have agreed that these dual objectives can be achieved by substituting a "zone" scoring system for determining eligiblity for appointment in place of the strict rank order system initially adopted by Corrections and Civil Service. The parties believe that use of such a zone system is consistent with the discussion in *Guardians Ass'n of New York City v. Civil Service,* 630 F.2d 79 at pages 102-03 (2d Cir. 1980). Based on consultation with experts who have used standard deviation analysis to estimate the likely "error of measurement" inherent in Examination No. 36-808 (assuming for purposes of this discussion only that Examination No. 36-808 is a valid, job-related examination), the parties have concluded that test score zones representing four-point ranges are appropriate in light of the *Guardians* analysis. Therefore, from the date of signing of this Stipulation permanent appointments to the position of Correction Lieutenant shall be made in the following manner:

(177) 1. Those persons who passed Examination No. 36-808 and who have not yet been appointed shall be divided into three zones. Zone 1 shall include all persons who received a final score of 82.5 or higher. Zone 2 shall include all persons who received final scores between and including 78.0 and 82.0. Zone 3 shall include all persons

who received scores between and including 73.0 and 77.5. Each zone shall be deemed to be single score for purposes of making permanent appointments pursuant to the New York State Civil Service Law.

2. Appointments from within a single zone, when eligibles within that zone are reachable for appointment pursuant to Civil Service Law Section 61(1), shall be made on the following good faith basis:

a. Appointments from within the zone shall first be made from eligible minority candidates if minority eligibles within the zone are available and willing to accept appointment, until minority appointments from the 36-808 list reflect the proportion of the eligible pool which is minority or until the minority appointments reach at least 21 percent of the total appointments from that list. (178) Thereafter, appointments shall be made in a proportion of one minority to four non-minority.

b. Any appointment for which no minority eligible within the zone remains available and willing to accept appointment shall be made from non-minority eligibles within the zone, pursuant to Civil Service Law Section 61(c).

3. Any appointment for which no eligibles who are available and willing to accept the appointment remain in any higher zone, may be made from the next lower zone pursuant to the provisions of Paragraph 2 above.

4. Any eligible who refuses a particular appointment will retain his or her position within the zone and shall remain available for subsequent appointment pursuant to the provisions of Paragraphs 2 and 3 above.

VI. Future selection procedures for Correction Lieutenant and Correction Captain.

1. Civil Service and Corrections shall develop and administer new selection procedures for the positions of Correction Lieutenant and Correction Captain.

(179) 2. Civil Service and Corrections shall consult with an industrial psychologist designated by plaintiffs on the development of the new selection procedures for Correction Lieutenant and Correction Captain. Plaintiffs' designated industrial psychologist will provide input in the development, review of the results, and implementation of the new selection procedures.

3. Plaintiffs' designated industrial psychologist's comments, whether written or oral, shall be advisory only and in no way binding on defendants, their successor agencies or successors in office, and the officers, employees and agents of said defendants or their successors. Defendants and plaintiffs' designated industrial psychologist shall cooperate in order to effectuate development and implementation of the new selection procedures in an efficient manner. In no event shall defendants be required to delay development or implementation of selection procedures as a result of unreasonable delay in receipt of comments from plaintiffs' designated industrial psychologist. Correspondingly, defendants shall furnish plaintiffs' designated industrial psychologist appropriate materials in a timely fashion and shall provide the industrial psychologist with a reasonable amount of time to provide his input.

4. Plaintiffs' designated industrial psychologist shall be paid at the rate of $60.00 per hour, plus expenses, but (180) the total amount of such fees and expenses shall not

exceed the sum of $30,000. Bills for such services and expenses shall be submitted in a form which complies with requirements of the comptroller of the State of New York.

5. The new selection procedure for Correction Lieutenant shall be developed and administered in accordance with the time frame set forth below:

a. Not later than the time at which Corrections, in making permanent appointments to the position of Correction Lieutenant, has reached and offered appointment to candidate number 572 on the 36-808 Eligibility List, Corrections shall request Civil Service to develop and administer the new selection procedure.

b. Upon receipt of such request from Corrections, Civil Service shall administer the new selection procedure within six (6) months.

c. Civil Service shall publish the Eligibility List based on the new selection procedure as soon as available and no later than six (6) months after administration of such procedure, but in no event shall (181) such list be certified for use in making permanent appointments until every eligible on the 36-808 List has been offered an appointment and has been afforded a reasonable opportunity to either accept or decline. When every eligible on the list has been offered an appointment, Corrections shall so advise Civil Service.

6. Defendants shall use their best efforts to commence administration of the new selection procedure for promotion to the rank of Correction Captain by September 30,

1983 but in no event shall administration of such selection procedure commence later than December 31, 1983. The Eligibility List based on the new selection procedure shall be published within six (6) months of commencement of administration of the procedure.

7. The new selection procedures to be developed pursuant to Paragraphs 1-6 above, shall be designed to obtain quality officers and to assure that the selection system does not have adverse impact. The specific measures outlined below are intended to achieve this goal.

a. The selection procedures shall be as content valid as feasible.

b. The selection procedures shall, consistent with selection standards such as (182) those of the American Psychological Association and the U.G.E.S.P., eliminate or minimize adverse impact on minority candidates.

c. In developing the new selection procedures, defendants shall consider the possibility of alternatives or supplements to written examinations, including use of oral examination or assessment center techniques.

d. In the event that a written examination is used as part of one or both of the new selection procedures, defendants shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on minority candidates, should such adverse impact result:

    i. Separate frequency distribution for minority and non-minority candidates;

ii. Elimination of particular items that result in statistically significant adverse racial impact among candidates of substantially equivalent ability.

(183) iii. Addition of items to off-set the adverse impact of other items.

e. Any selection procedure that is adopted including the setting of cut-off scores or rank ordering features, shall be used in a manner, that, consistent with validity and utility, reduces or eliminates adverse racial impact.

VII. ATTORNEYS FEES, COSTS, AND EXPENSES

For purposes of this Article plaintiffs are prevailing parties and are entitled to recover their expenses, costs, and reasonable attorneys fees. Following final approval of this Stipulation of Settlement the parties shall meet and seek to reach agreement on the amount of attorneys fees, costs, and expenses. Such agreement shall be subject to the approval of the Court.

If the parties are unable to agree, plaintiffs may, by appropriate motion, present the matter to the Court for resolution.

The Court will retain jurisdiction for purposes of resolving any disputes that may arise under this Article VII.

(184) VIII. DEFINITIONS

As used herein:

1. *Corrections.* "Corrections" shall mean and refer to the New York State Department of Corrections, its Commissioner and officers, their successors in office, and all

persons in active concert or participation with or under the control or direction of any of them.

2. *Civil Service.* "Civil Service" shall mean and refer to the New York State Department of Civil Service, its Commissioners and officers, their successors in office, and all persons in active concert or participation with or under the control or direction of any of them.

3. *Black or blacks.* "Black" or "blacks" shall mean and refer to any person or persons, not of hispanic origin, having origins in any of the black racial groups.

4. *Hispanic or hispanics.* "Hispanic" or "hispanics" shall mean and refer to any person or persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race.

5. *Minority or minorities.* "Minority" or "minorities" shall mean and refer to blacks and hispanics.

(185) 6. *U.G.E.S.P.* The initals U.G.E.S.P., shall mean and refer to the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.

IX. APPROVAL

The parties agree to the entry of this stipulation subject to the approval of the Court. Undersigned counsel represent that they are authorized to enter into this Stipulation on behalf of their respective clients and that this signed Stipulation is binding on the parties.

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for all Defendants

By: ANN HOROWITZ
Assistant Attorney General

BARBARA B. BUTLER
Assistant Attorney General
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-3899

PENDA O. HAIR
Attorney for all plaintiffs

O. PETER SHERWOOD
Of Counsel

A true copy RAYMOND F. BURGHARDT, Clerk

By (Illegible)
Deputy Clerk

Court Approval

This stipulation is approved and the action is hereby stipulation entered this day of , 1982.

United States District Judge

(186) *Attachment 1*

(187) *Notice of Settlement of Employment Discrimination Case and of Hearing on Objections*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

82 Civ. 295 (TPG)

PLEASE TAKE NOTICE that a stipulation of settlement and dismissal settling the above-captioned employment discrimination action concerning Correction Lieutenant Examination No. 36-808 has been signed and submitted to the Court for approval. A hearing thereon will be held on September 29, 1982 at 9:30 a.m. in the United States Courthouse, Foley Square, New York, New York in Room 601. Any employee of the Department of Correctional Services who believes his or her interests may be affected by the settlement of this case and who wishes to

have his or her views regarding the stipulation considered by the Court at that time must file a written statement of their views with the Clerk of the Court, Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007 no later than 4 p.m. on (188) September 24, 1982. Those statements must contain the following reference prominently displayed at the top of the first page: "*Kirkland v. Department of Correctional Services*, 82 Civ. 29 (T.P.G.)." Copies of those statements must also be served personally or by mail on the following:

1) Honorable Thomas P. Griesa, United States District Judge, Southern District of New York, United States Courthouse, Foley Square, New York, New York 10007;

2) NAACP Legal Defense Fund, 10 Columbus Circle, New York, New York 10019 (Attn: O. Peter Sherwood); and,

3) New York State Attorney General's Office, Litigation Bureau, 2 World Trade Center, New York, New York 10047 (Attn: Assistant Attorney General Ann Horowitz).

A brief description of this litigation and of the term of the settlement are set forth below. You should read the Stipulation itself for a full description of the terms of the settlement. Copies of the Stipulation of Settlement have been placed in the line up room of each correctional facility and can be examined there, and are also on file with and can be examined during normal working hours at the Office of the Clerk of the Court, Southern District of New York, the Office of the Attorney General (2 World Trade Center, 49th floor), and the offices of the NAACP Legal Defense Fund (10 Columbus Circle, 20th floor).

(189) Plaintiffs are employees of the New York State Department of Correctional Services who took Examination No. 36-808 for the position of Correction Lieutenant. The lawsuit involves civil rights claims concerning the development, administration, and use of Examination No. 36-808. Prior to any final decision by the Court, this settlement was entered into.

The provisions of the settlement are summarized as follows:

1. *Future Promotions From The 36-808 List*

The 36-808 list will continue to be used in making permanent promotional appointments to the position of Correction Lieutenant. The life of the list will be extended until every eligible on the list has been canvassed once. Those eligibles on the list who have not yet been appointed will be divided, on the basis of their final scores, into three zones, as follows: Zone 1 includes score 82.5 and up; Zone 2 includes score 78 to score 82; Zone 3 includes score 73 to score 77.5. Each zone will be deemed to be a single score for purposes of tie-breaking under the Civil Service Law. To the extent that minority candidates are reachable and willing to accept appointment, appointments within a zone will be made first from minority eligibles until minority appointments reflect the list minority percentage or reach at least 21%, and (190) thereafter, in a proportion of one minority to four non-minority.

2. *Future Selection Procedures For Captain And Lieutenant*

New selection procedures will be developed for Captain and Lieutenant. The new selection procedures for Captain

will be administered between September 1983 and December 1983. The new selection procedures for Lieutenant will be administered within a time frame such that the resulting eligible list will be certified for use in making permanent appointments once every eligible on the 36-808 list has been canvassed.

Defendants will consult with an industrial psychologist designated by plaintiffs concerning the development and use of the new selection procedures, and will consider the possibility of alternatives or supplements to written examinations. The goals of the new selection procedures are to obtain quality officers and avoid adverse racial impact.

3. *Class Certification*

This action is properly maintainable as a class action. The class includes all minority (Black and Hispanic) persons who took and passed Examination No. 36-808 and had not been permanently appointed as Lieutenants prior to January 30, 1982.

(191) This Notice is published pursuant to Order of the Court dated , 1982.

RAYMOND F. BURGHARDT
Clerk of the Court
Southern District of New York

Appendix G—Constitution, Acts, Statutes, Rules and Regulations.

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U. S. C. §2000e—2(h).

(h) Seniority or merit system; ability tests. Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U. S. C. 206(d)).

42 U. S. C. §2000e—4.

Equal Employment Oportunity Commission

(a) Creation; membership; term; chairman and vice chairman; appointment of personnel. There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. Members of the Commission shall be appointed by the President by and with the advice and consent of the Senate for a term of five years. Any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed, and all members of the Commission shall continue to serve until their successors are appointed and qualified, except that no such member of the Commission shall continue to serve (1) for more than sixty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the sine die of the session of the Senate in which such nomination was submitted. The President shall designate one member to serve as Chairman of the Commission, and one member to serve as Vice Chairman. The Chairman shall be responsible on behalf of the Commission for the administrative operations of the Commission, and except as provided in subsection (b), shall appoint, in accordance with the provisions of title 5, United States Code,

governing appointments in the competitive service, such officers, agents, attorneys, administrative law and employees as he deems necessary to assist it in the performance of its functions and to fix their compensation in accordance with the provisions of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, relating to classification and General Schedule pay rates: *Provided*, That assignment, removal, and compensation of administrative law judge shall be in accordance with sections 3105, 3344, 5362, and 7521 of title 5, United States Code.

(b)—(i) [Unchanged]

(As amended Mar. 27, 1978, P. L. 95-251, § 2(a)(11), 92 Stat. 183.)

(b) General Counsel; attorneys. (1) There shall be a General Counsel of the Commission appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel shall have responsibility for the conduct of litigation as provided in sections 706 and 707 of this title. The General Counsel shall have such other duties as the Commission may prescribe or as may be provided by law and shall concur with the Chairman of the Commission on the appointment and supervision of regional attorneys. The General Counsel of the Commission on the effective date of this Act shall continue in such position and perform the functions specified in this subsection until a successor is appointed and qualified.

(2) Attorneys appointed under this section may, at the direction of the Commission, appear for and represent the Commission in any case in court, provided that the Attorney General shall conduct all litigation to which the Commission is a party in the Supreme Court pursuant to this title.

(c) Vacancy; quorum. A vacancy in the Commission shall not impair the right of the remaining members to exercise all the powers of the Commission and three members thereof shall constitute a quorum.

(d) Official seal. The Commission shall have an official seal which shall be judicially noticed.

(e) Report. The Commission shall at the close of each fiscal year report to the Congress and to the President concerning the action it has taken and the moneys it has disbursed. It shall make such further reports on the cause of and means of eliminating discrimination and such recommendations for further legislation as may appear desirable.

(f) Offices. The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise any or all its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) Powers of Commission. The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;
(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;
(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;
(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;
(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;
(6) to intervene in a civil action brought under section 706 by an aggrieved party against a respondent other than a government, governmental agency or political subdivision.

(h) Cooperation with other departments and agencies with regard to educational and promotional activities. The Commission shall, in any of its educational or promotional activities, cooperate with other departments and agencies in the performance of such educational and promotional activities.

(i) Application of Hatch Act provisions to personnel. All officers, agents, attorneys, and employees of the Commission shall be subject to the provisions of section 9 of the Act of August 2, 1939, as amended (the Hatch Act), notwithstanding any exemption contained in such section.
(July 2, 1964, P. L. 88-352, Title VII, § 705, 78 Stat. 258; Mar. 24, 1972, P. L. 92-261, § 8(d)-(f) 86 Stat. 109, 110; Jan. 2, 1975, P. L. 93-608, § 3(1), 88 Stat. 1972.)

42 U. S. C. §2000e—5.

Prevention of unlawful employment practices

(a) Power of Commission. The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title.

(b) Charges; notification; investigation and determination. Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d). If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d), from the date upon which the Commission is authorized to take action with respect to the charge.

(c) **State or local proceedings.** In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) [(b)] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(d) **Time for action under State or local law.** In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) **Time for filing charges.** A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful

employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(f) Civil action by Commission, Attorney General, or person aggrieved. (1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action with-

out the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation, that prompt judicial action is necessary to carry out the purposes of this Act [title], the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Injunctions; affirmative action; equitable relief. If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 704(a)

(h) Certain provisions inapplicable to actions against unlawful practices. The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) Proceedings to compel compliance with orders. In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

(j) Appeals. Any civil action brought under this section and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code

(k) Attorney's fee. In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

(July 2, 1964, P.L. 88-352, Title VII, § 706, 78 Stat. 259; Mar. 24, 1972, P. L. 92-261, § 4, 86 Stat. 104.)

Rule 24. Intervention

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U.S.C. § 2403.

CONSTITUTION
OF THE
STATE OF NEW YORK

As Amended and in Force January 1, 1982

ARTICLE V—OFFICERS AND CIVIL DEPARTMENTS

§ 6. [Civil service appointments and promotions; veterans' preference and credits]

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive; provided, however, that any member of the armed forces of the United States who served therein in time of war, who is a citizen and resident of this state and was a resident at the time of his entrance into the armed forces of the United States and was honorably discharged or released under honorable circumstances from such service, shall be entitled to receive five points additional credit in a competitive examination for original appointment and two and one-half points additional credit in an examination for promotion or, if such member was disabled in the actual performance of duty in any war, is receiving disability payments therefor from the United States veterans administration, and his disability is certified by such administration to be in existence at the time of his application for appointment or promotion, he shall be entitled to receive ten points additional credit in a competitive examination for original appointment and five points additional credit in an examination for promotion. Such additional credit shall be added to the final earned rating of such member after he has qualified in an examination and shall be granted only at the time of establishment of an eligible list. No such member shall receive the additional credit granted by this section after he has received one appointment, either original entrance or promotion, from an eligible list on which he was allowed the additional credit granted by this section.

NEW YORK

CIVIL SERVICE LAW

§ 50. Examinations generally

1. Positions subject to competitive examinations. The merit and fitness of applicants for positions which are classified in the competitive class shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction.

2. Announcement of examination. The state civil service department and municipal commissions shall issue an announcement of each competitive examination, setting forth the minimum qualifications required, the subjects of the examination, and such other information as they may deem necessary, and shall advertise such examination in such manner as the nature of the examination may require. Such announcement and advertisement shall each inform prospective applicants of the options for religious observance provided in subdivision eight of this section.

3. Application for examination. The civil service department and municipal commissions shall require prospective applicants to file, during a prescribed time, a formal application in which the applicant shall state such information as may reasonably be required touching upon his background, experience and qualifications for the position sought, and his merit and fitness for the public service. The application shall be subscribed by the applicant and shall contain an affirmation by him that the statements therein are true under the penalties of perjury. Blank forms for such application shall be furnished by said department and such municipal commissions without charge to all persons requesting the same. The department and such municipal commissions may require in connection with such application such certificates of citizens, physicians, public officers or others having knowledge of the applicant, as the good of the service may require.

4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

(b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position; or

[*(c) Repealed*]

(d) who has been guilty of a crime; or

(e) who has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise been terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from his incompetency or misconduct; or

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment; or

(h) who has been dismissed from private employments because of habitually poor performance.

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

5. Application fees. (a) Every applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required,

shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on salaries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, the state civil service department, subject to the approval of the director of the budget, a municipal commission, subject to the approval of the governing board or body of the city or county, as the case may be, or a regional commission or personnel officer, pursuant to governmental agreement, may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that only the civil service department, with the approval of the director of the budget, shall have authority to waive application fees or establish a different schedule of fees for any examinations prepared and rated by the civil service department for positions under the jurisdiction of a municipal commission.

(c) All fees collected hereunder by the state civil service department, except as hereinafter provided, shall be paid into the state treasury in the manner prescribed by the state finance law. Fees collected from applicants for examinations given exclusively for positions in the division of employment in the department of labor shall be held in trust until such time as the costs of such

examinations have been ascertained and thereupon shall be disbursed as follows: (1) to the extent that such fees are sufficient therefor, there shall be paid into the unemployment administration fund maintained under the unemployment insurance law, an amount equal to the costs of such examinations. Such payments shall be made on the fifth day of the month following the month in which such costs were ascertained and shall be accompanied by a detailed, verified statement and a duplicate of such statement shall be filed on the same day with the state comptroller; (2) the balance, if any, of such fees shall be paid into the state treasury pursuant to the state finance law.

(d) All fees collected hereunder by any municipal civil service commission shall be paid into the general fund of the municipality for which such commission has been appointed.

6. Scope of examinations. Examinations shall be practical in their character and shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of that service into which they seek to be appointed. The state civil service department or appropriate municipal commission, as the case may be, may establish an eligible list on the basis of ratings received by the candidates in the competitive portions of the examination and thereafter conduct medical, physical and other appropriate non-competitive qualifying tests from time to time as the need for certifications from the eligible list may require.

7. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection.

8. Examination of candidates unable to attend tests because of religious observance. A person who, because of his religious beliefs, is unable to attend and take an examination scheduled to be held by the state department of civil service or a municipal commission on a Saturday or on a day which is a religious holiday observed by him, shall be permitted to take such examination on some other day designated by the state department of civil service or appropriate municipal commission, at a reasonably comparable time and place without any additional fee or penalty.

9. The term "physical or mental disability" as used in this section, means a physical, mental or medical impairment result-

ing from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. Determination of physical or mental disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction.

NEW YORK

CIVIL SERVICE LAW

§ 51. Filling vacancies by open competitive examination

1. Upon the written request of the appointing officer stating his reasons therefor, or on its own initiative, the state civil service department or appropriate municipal commission may determine to conduct an open competitive examination for filling a vacancy or vacancies instead of a promotion examination.

2. Except where the state civil service department or appropriate municipal commission finds that there are less than three persons eligible for promotion in the promotion unit where the vacancy exists, or in the department, if such vacancy is not in a separate promotion unit, and except where the department or municipal commission determines to conduct an open competitive and a promotion examination simultaneously, a notice of intention to conduct such open competitive examination or a copy of the appointing officer's request for open competitive examination, as the case may be, shall be publicly and conspicuously posted in the offices of both the appointing officer and the state civil service department or appropriate municipal commission and such request shall not be acted upon until said notice has been posted as aforesaid for a period of not less than fifteen days.

3. Any employee who believes that a promotion examination should be held for filling such vacancy may submit to the state civil service department or appropriate municipal commission his request, in writing, for a promotion examination rather than an open competitive examination, stating the reasons why he believes it to be practicable and in the public interest to fill the vacancy by promotion examination.

NEW YORK

CIVIL SERVICE LAW

§ 52. Promotion examinations

1. Filling vacancies by promotion. Except as provided in section fifty-one, vacancies in positions in the competitive class shall be filled, as far as practicable, by promotion from among persons holding competitive class positions in a lower grade in the department in which the vacancy exists, provided that such lower grade positions are in direct line of promotion, as determined by the state civil service department or municipal commission; except that where the state civil service department or a municipal commission determines that it is impracticable or against the public interest to limit eligibility for promotion to persons holding lower grade positions in direct line of promotion, such department or commission may extend eligibility for promotion to persons holding competitive class positions in lower grades which the department or commission determines to be in related or collateral lines of promotion, or in any comparable positions in any other unit or units of governmental service and may prescribe minimum training and experience qualifications for eligibility for such promotion.

2. Factors in promotion. Promotion shall be based on merit and fitness as determined by examination, due weight being given to seniority. The previous training and experience of the candidates, and performance ratings where available, may be considered and given due weight as factors in determining the relative merit and fitness of candidates for promotion.

3. Promotion eligibility of persons on preferred lists and employees on leave of absence. Any employee who has been suspended from his position through no fault of his own and whose name is on a preferred list, and any employee on leave of absence from his position, shall be allowed to compete in a promotion examination for which he would otherwise be eligible on the basis of his actual service before suspension or leave of absence.

4. Departmental and interdepartmental promotion lists. The state civil service department and municipal commissions may establish interdepartmental promotion lists which shall not be certified to a department until after the promotion eligible list for that department has been exhausted.

5. Promotion units. In the state service, or in the service of a city containing more than one county, promotion examinations may be held for such subdivisions of a department as the state civil service department or the municipal commission of such city, as the case may be, may determine to be an appropriate promotion unit, but departmental and interdepartmental promotion eligible lists shall not be certified to a department until after the promotion unit eligible lists for that department have been exhausted.

6. Promotion and transfer to administrative positions in the state service.

(a) For the purpose of this subdivision, the term "administrative positions" shall include competitive class positions in the state service in law, personnel, budgeting, methods and procedures, management, records analysis, and administrative research, as determined by the state civil service department.

(b) Except as provided in section fifty-one, vacancies in administrative positions shall be filled, so far as practicable, by promotion as prescribed in subdivision one of this section, which may be made from among persons holding administrative positions in lower grades without regard to the specialties of their lower grade positions. The civil service department, upon the request of an appointing officer stating the reasons why the filling of administrative positions in grade fourteen or higher under his jurisdiction from an interdepartmental promotion list or a promotion list including persons employed in other units of government would be in the best interests of the state service, or upon its own initiative whenever it finds that the filling of administrative positions in grade fourteen or higher in any department from such an interdepartmental or intergovernmental promotion list would be in the best interests of the state service, may certify such an interdepartmental or intergovernmental promotion list for filling such positions, without preference to departmental lists or to eligibles holding lower grade positions in the department or promotion unit in which such positions exist.

(c) Transfers shall be allowed between administrative positions in the same or related or collateral specialties which involve substantially equivalent tests or qualifications, subject to such conditions and limitations as the state civil service department may prescribe.

(d) The provisions of this subdivision shall be applicable and controlling, notwithstanding any other provisions of this section or chapter or any other law.

7. Promotion by non-competitive examination. Whenever there are no more than three persons eligible for examination for promotion to a vacant competitive class position, or whenever no more than three persons file application for examination for promotion to such position, the appointing officer may nominate one of such persons and such nominee, upon passing an examination appropriate to the duties and responsibilities of the position may be promoted, but no examination shall be required for such promotion where such nominee has already qualified in an examination appropriate to the duties and responsibilities of the position.

8. Limitation upon promotion. No promotion shall be made from one position or title to another position or title unless specifically authorized by the state civil service department or municipal commission, nor shall a person be promoted to a position or title for which there is required, by this chapter or the rules, an examination involving essential tests or qualifications different from or higher than those required for the position or title held by such person unless he has passed the examination and is eligible for appointment to such higher position or title.

9. Increase in salary as a promotion. For the purposes of this section an increase in the salary or other compensation of any person holding an office or position within the scope of the rules in force hereunder, beyond the limit fixed for the grade in which such office or position is classified, shall be deemed a promotion.

10. Credit for provisional service. No credit in a promotion examination shall be granted to any person for any time served as a provisional appointee in the position to which promotion is sought or in any similar position, provided, however, such provisional appointee by reason of such provisional appointment shall receive credit in his permanent position from which promotion is sought for such time served in such provisional appointment.

11. Notwithstanding any other provision of law, the state department of civil service may, for titles designated by it, extend to employees in the state service who are holding or who have held a position in the non-competitive class of such service the same opportunity as employees in the competitive class to take

promotion examinations if such examinations are to be held in conjunction with open competitive examinations.

12. Notwithstanding any other provisions of law, a municipal commission may, for entrance level titles as defined and designated by it, extend to employees in the service of a civil division who are holding or who have held a position in the non-competitive class of such service for a period of two years the same opportunity as employees in the competitive class to take promotion examinations for which such non-competitive class service is determined by the municipal commission to be appropriate preparation if such examinations are to be held in conjunction with open competitive examinations.

13. Notwithstanding any other provision of law, a municipal commission may, for titles designated by it, extend to employees in the service of a civil division who are holding or who have held a position in the non-competitive class of such services pursuant to the provisions of section fifty-five-b of this chapter, the same opportunity as employees in the competitive class to take promotion examinations.

14. Notwithstanding any other provision of law, the state civil service commission may, for titles designated by it, extend to employees in the state service who are holding or who have held a position in the non-competitive class of such services pursuant to the provisions of section fifty-five-b of this chapter the same opportunities to take promotion examinations as provided to employees in the competitive class.

NEW YORK

CIVIL SERVICE LAW

§ 56. Establishment and duration of eligible lists

The duration of an eligible list shall be fixed at not less than one nor more than four years; provided that, except for lists promulgated for police officer positions in jurisdictions other than the city of New York, in the event that a restriction against the filling of vacancies exists in any jurisdiction, the state civil service department or municipal commission having jurisdiction shall, in the discretion of the department or commission, extend the duration of any eligible list for a period equal to the length of such restriction against the filling of vacancies. Restriction against the filling of vacancies shall mean any policy, whether by executive order or otherwise, which, because of a financial emergency, prevents or limits the filling of vacancies in a title for which a list has been promulgated. An eligible list that has been in existence for one year or more shall terminate upon the establishment of an appropriate new list, unless otherwise prescribed by the state civil service department or municipal commission having jurisdiction.

NEW YORK

CIVIL SERVICE LAW

§ 60. Certification of eligible lists

1. Certification of eligibles from prior list. When an eligible list has been in existence for less than one year and contains the names of less than three persons willing to accept appointment, and a new list for the same position or group of positions is established, the names of the persons remaining on the old list shall have preference in certification over the new list until such old list is one year old, and during such period such names shall be certified along with enough names from the new list to provide the appointing officer with a sufficient number of eligibles from which selection for appointment may be made. Where an old list which has been in existence for one year or more is continued upon the establishment of a new list which contains less than three names, the civil service department or a municipal commission may certify the names on the old list along with enough names from the new list to provide the appointing officer with a sufficient number of eligibles from which selection for appointment may be made.

2. Certification on basis of sex. The state department of civil service or the municipal commission having jurisdiction may limit certification from an eligible list to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection.

3. Certification of lists for state positions. Certifications for appointments to positions in the state service, regardless of the location thereof, shall be made from the state-wide lists of eligibles; provided, however, that the state civil service department may, wherever practicable, certify from an appropriate eligible list for appointment to a state position, in any locality outside Albany county, residents of the county or judicial district including such locality, or of any combination of counties or judicial districts including such locality, as determined by such department. Notice of the proposed certification of eligibles by local residence in accordance with the provisions of this subdivision shall be included in the announcement of examination. Upon the exhaustion of the list of local residents certified to a position in the state service in a particular locality pursuant to the provisions of this subdivision, the state-wide list of eligibles shall be certified to fill vacancies in such position in such locality.

NEW YORK

CIVIL SERVICE LAW

§ 61. Appointment and promotion

1. Appointment or promotion from eligible lists. Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligible list who are willing to accept such appointment or promotion; provided, however, that the state or a municipal commission may provide, by rule, that where it is necessary to break ties among eligibles having the same final examination ratings in order to determine their respective standings on the eligible list, appointment or promotion may be made by the selection of any eligible whose final examination rating is equal to or higher than the final examination rating of the third highest standing eligible willing to accept such appointment or promotion. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled.

2. Prohibition against out-of-title work. No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person shall be assigned to perform the duties of any position unless he has been duly appointed, promoted, transferred or reinstated to such position in accordance with the provisions of this chapter and the rules prescribed thereunder. No credit shall be granted in a promotion examination for out-of-title work.

NEW YORK

CIVIL SERVICE LAW

§ 95. Duties of public officers

It shall be the duty of all officers of the state of New York or of any civil division or city thereof to conform to and comply with and to aid in all proper ways in carrying into effect the provisions of this chapter, and the rules and regulations prescribed thereunder. No officer or officers having the power of appointment or employment shall appoint or select any person for appointment, employment, promotion or reinstatement except in accordance with the provisions of this chapter and the rules and regulations established thereunder. Any person employed or appointed contrary to the provisions of this chapter or of the rules and regulations established thereunder shall be paid by the officer or officers so employing or appointing, or attempting to employ or appoint him, the compensation agreed upon for any services performed under such appointment or employment or, in case no compensation is agreed upon, the actual value of such services and any necessary expenses incurred in connection therewith, and shall have a cause of action against such officer or officers for such sum and for the costs of the action. No public officer shall be reimbursed by the state or any of its civil divisions for any sums so paid or recovered in any such action.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 3.6 Establishment of eligible lists

Every candidate who attains a passing mark in an examination as a whole and who meets the standards prescribed, if any, for separate subjects or parts of subjects of the examination shall be eligible for appointment to the position for which he was examined and his name shall be entered on the eligible list in the order of his final rating; but if two or more eligibles receive the same final rating in the examination, they shall be ranked in accordance with such uniform, impartial procedure as may be prescribed therefor by the Civil Service Department.

RULES AND REGULATIONS
OF THE
DEPARTMENT OF CIVIL SERVICE

As amended to January 12, 1983

§ 4.2 Appointment and promotion

(a) Except as otherwise provided herein, appointment or promotion to a position in the competitive class shall be made by the selection of a person on the appropriate eligible list willing to accept such appointment and whose final rating in the examination is equal to or higher than the rating of the third highest ranking eligible on the list indicating willingness to accept such appointment. The term "ranking" as used herein refers to the order in which the names of eligibles appear on the eligible list as provided in section 3.5.

(b) Whenever a vacancy exists in a competitive class position and an open competitive examination does not result in an eligible list containing the names of at least three persons willing to accept appointment, the Civil Service Department may permit the appointing authority to nominate a person for noncompetitive examination for such position and, if such nominee shall be certified by the Civil Service Department as qualified, he may be appointed to fill such vacancy; or the Civil Service Department may designate the eligible list, if there be one, as a continuing eligible list in accordance with section 57 of the Civil Service Law, and insert therein the names of additional eligibles as they are found qualified by examinations held at such intervals as may be prescribed.

(c) Promotion by noncompetitive examination may also be made as provided by law.

(d) Certification of a promotion eligible list shall not be required for filling certain vacancies. A promotion eligible list shall not be certified for filling a permanent vacancy created by upward reclassification of a permanently encumbered position where promotion from such list would require the layoff of a permanent employee or the reassignment of a permanent employee to a different geographical location; but this provision shall not apply if the incumbent whose position was reclassified has, following such reclassification, twice failed to qualify for promotion to the reclassified position.

(e) An open competitive eligible list shall not be certified for filling a permanent vacancy created by upward reclassification of a permanently encumbered position if appointment from such list would require the layoff of a permanent employee or the reassignment of a permanent employee to a different agency or a different geographical location; but this provision shall not apply if the incumbent whose position was reclassified has, following such reclassification, twice failed to qualify for appointment to the reclassified position.

No. 83-672

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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Question Presented

Whether the Court of Appeals was correct in upholding the settlement of this Title VII action where a *prima facie* case of discrimination had been established by a statistical demonstration of disproportionate racial impact, and where the terms of the settlement were both reasonable and in accord with federal law.

Parties in Courts Below

The parties to the proceedings below, in addition to those named in the caption, include the following named plaintiffs-appellees: Edward L. Kirkland, Joseph P. Bates, Sr., and Arthur E. Suggs, each individually and on behalf of all others similarly situated.

The following named defendants-appellees:

Thomas A. Coughlin III, individually and in his capacity as Commissioner of the New York State Department of Correctional Services, the New York State Civil Service Commission, Joseph Valenti, individually and as President thereof and as a Civil Service Commissioner, Josephine Gambino and James McFarland, individually and in their capacity as Civil Service Commissioners;

The following named intervenors-appellants, respondents herein:

Robert McClay, Ray Smith, Charles Mutz, Gary Bartlett, Bob Pressel. L. Kinney, Gene Vanover, Herbert Jones, Larry George, Raymond Peters, Gordon Wells, Donald Carey, R. Vissmer, P. Buffalo, S. Delsanto, J. O'Rourke, R. Weed, D. Butterton, T. Brooks, James Bonnell, Jr., Ronald Krom, Wayne Elberth, Paul Borko, Ken Curry, John Higgins, Ronald Kurz, George Ribas, Mark Reeves, Joseph Mitchell, Al Luning, Ronald Kelly, Arthur Shuts, E. Hanscom, R. Wilson, V. Scott, V. Dunn, C. Harvey.

The following named intervenors-appellants, petitioners herein:

Paul W. Annetts, Edward T. DeVoe, Robert G. Knapp, William C. Badger, Elwyn M. Dickson, Lewis J. Kordyl, Jr., Arlo G. Baker, Anthony J. DiDonna, Marvin Kushner, Philip Barbarello, Edward R. Donnelly, Edward R. LaDuke, John A. Battista, Richard P. Donohue, Garry J. LaVarnway, Edward J. Beauchemin, Donald J. Dunn, David Lavigne, Robert L. Bennett, William Eddy, Morton D. Lawliss, James E. Berg, Carl Edwards, James H. Layhee, Ronald D. Besimer, Kenneth Eissing, George Liberty, John F. Bickford, Paul E. Ellsworth, Joseph Michael Liffland, Allen F. Blades, William H. Eull, Aelred F. Lippold, Howard Block, Ludirck E. Fabian, Elendo J. Lombardi, John O. Block, John Festa, Robert E. Mahoney, Ronald E. Bodge, Thomas R. Fish, Richard P. Malark, Wilbert Boileau, Peter J. Fitzgerald, Francis R. Maloney, Charles William Bowes, Thomas R. Fitzgerald, Howard Maneely, Harmon Boyd, Henry L. George, George W. Manor, Marilyn J. Bradt, John F. Gilsenan, John McCabe, Robert Butchino, Orville J. Gload, Robert J. McClellan, Carl C. Caldwell, Kenneth J. Goeway, Russell J. McClennan, Alexander D. Campbell, Richard W. Gordon, Patrick B. McGee, Thomas E. Canning, Alan A. Gratto, Gordon C. Melville, Winifred V. Carron, Daniel B. Green, John T. Miner, Richard A. Cherry, Melvin R. Greenfield, Gary L. Mitchetti, Norman W. Christian, James C. Haight, James H. Morgan, Lois B. Coffey, Charles J. Hamel, Ferenc Morvai, Ismael C. Colon, James H. Handlin, Jr., Ronald W. Moscicki, Clarence William Colwell, Neil Harris, H.J. Mulhall, Dennis M. Conroy, Ronald D. Haseltine, Carl A. Nico, James T. Conway, Thomas Heffernan, Gary C. Nolan, William L. Corlew, Roy W. Henneberg, Ronald R. Norton, Fred R. Coutant, Hugh P. Hicks, Louis Padilla, Wayne L. Cuer, Dennis E. Hoff, Max A. Palmer,

Joseph DeCaterina, Bruce A. Kessler, Wilfred V. Parotte, Andrew J. DeGaust, Robert J. Kirby, Melvin A. Pavquette, Jr., Richard Delany, Frank Kisch, Daniel M. Pelton, Daniel L. Denkenberger, Harry E. K. Ages, Keith D. Perkings, Thomas P. Devlin, Jr., Charles A. Kline, Walter F. Pitt, Brian Pleace, Robert M. Semski, Gary Tauurmins, Allyn D. Plowe, John Senchack, Neil A. Terwilliger, Richard S. Pochintesta, David A. Sharp, Francis W. Tessier, James L. Pollack, Arthur P. Sheets, Dennis Thompson, William D. Poole, Joseph H. Sheldon, James Tompkins, Doughlas W. Powers, John M. Sherlock, Robert J. Tyrell, Roebrt E. Racette, Harvey Jay Singer, Augustine E. VanOrden, John R. Rafferty, James C. Sipe, Roger N. Walker, Leonard Fred Rayce, Francis J. Sluka, Conrad K. Walter, Wal- C. Rathbun, Ronald C. Skinner, David W. Walsh, ter Redgate, Larry D. Smith, Jack Weiman, Walter J. Rivers, Warren Smith, Betty J. Welch, Stanley M. Rushford, Norman Steinhilber, Milo Williams, Charles T. Ryan, Arthur J. Steinhofer, Ralph J. Wolcott, Dennis Ryan, William J. Stiles, Donald R. Wolff, George R. Schmidt, Harold L. Streigold, Arthur Wood, Patsy J. Sciarra, Paul F. Stringham, Norman M. Zelinsky, William G. Scott, John M. Sullivan.

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No. 83-672

IN THE

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FREDERICK E. ALTHISER, *et al.*,

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against

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

Statement of the Case

In October, 1981, a written examination for the title of Correction Lieutenant in the New York State Department of Corrections Services ("Corrections"), Examination No. 36-808, was administered by the New York State Department of Civil Service ("Civil Service"). An eligible list, based on that examination, was published in December, 1981. Plaintiffs, three black Correction Sergeants (respondents here), brought this action in January, 1982,

against agencies and state officials (respondents here) on behalf of themselves and other black and Hispanic minorities who sat for the examination in question. Plaintiffs alleged that use of the examination discriminated against minorities.

Litigation History of Examinations for Corrections Supervisory Security Titles

A review of the past ten years of litigation concerning examinations for Corrections supervisory security titles is necessary for a full understanding of the case.

In 1972, Civil Service administered a written test for the position of Correction Sergeant. In 1974, the United States District Court for the Southern District of New York (Lasker, J.) held that the Sergeant's examination unconstitutionally discriminated against minorities, as it had an adverse racial impact and was not adequately validated. *Kirkland* v. *New York State Department of Correctional Services,* 374 F. Supp. 1361 (S.D.N.Y. 1974), *aff'd in part, rev'd in part,* 520 F.2d 420 (2d Cir.), *reh. en banc denied,* 531 F.2d 5 (1975), *cert. denied,* 429 U.S. 823, *reh. denied,* 429 U.S. 1123 (1976) ("Kirkland Sergeants").* The district court ordered defendants to develop new selection procedures to be validated by means of an empirical, criterion-related validation study.

* The full citation is *Kirkland* v. *New York State Department of Correctional Services,* 358 F. Supp. 1349 (S.D.N.Y. 1973) (mtn. to dsms or change venue den.), 374 F. Supp. 1361 (1974), unreported order dated 7/14/74 granting motion to intervene by Ribiero and Coons, but denying intervenors class status, 374 F. Supp. 1361, *aff'd* in part, rev. in part, 520 F. 2d 420 (2d Cir.), reh. en banc den., 531 F. 2d 5 (1975), cert. den. 429 U.S. 823, reh. den. 429 U.S. 1123 (1976), 482 F. Supp. 1179 (S.D.N.Y. 1980) (approving relief exam on pltfs. and defts. for summy judmt), *aff'd* 628 F. 2d 1214 (S.D.N.Y. 1981) pltfs. mtn. for atty. fees against intervenors den.).

Between 1974 and 1979, the selection procedures required by the district court were developed and administered. The final selection procedures consisted of both a written examination and performance evaluation. A criterion validation study was performed which showed that minorities characteristically performed less well than non-minorities on the selection procedures, but that this difference was not reflected in differences in job performance. In light of these analyses the district court found that use of the test as originally scored would be unfair and, therefore, that the use of the selection procedures should be revised. *Id.* 482 F. Supp. 1182 (S.D.N.Y. 1980). The manner of revision adopted by defendants, and approved by the district court, to assure fairness was the addition of 250 points to the final scores of minority candidates. The score adjustment was challenged by a group of non-minority intervenors, but the district court upheld the adjustment. *Kirkland Sergeants*, 482 F. Supp. 1179 (S.D.N.Y.), *aff'd*, 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981).

In 1981, employees of the Department of Correctional Services successfully petitioned the Supreme Court of the State of New York, Albany County, for an order compelling Civil Service to administer competitive examinations for the positions of Correction Lieutenant and Correction Captain. *Matter of Edgerton*, 84 A.D. 2d 881 (3d Dep't 1981). Examination No. 36-808 for Correction Lieutenant was administered on October 3, 1981. Examination No. 37-526 for Correction Captain was administered on January 30, 1982.

The Correction Lieutenant Examination

The written examination for Correction Lieutenant was administered to 728 candidates. One hundred and sixty-eight (23%) of the candidates were minority candidates. Of the candidates, 92% of the white candidates passed the written test, while 86% of the black candidates and 92% of the Hispanic candidates similarly passed the test. An eligible list of approximately 670 persons was certified by Civil Service on December 23, 1981. While the overall minority representation on the list was approximately 22%, the minority representation was disproportionately low at the top of the list and disproportionately high at the bottom of the list. The final score on the certified list also included points for seniority and veterans' credits. The racial/ethnic breakdown of the list was:

Number of Persons in Order of Final Score	*% Min.*	*No. Min.*	*No. Non-Min.*
1-107	5.6	6	101
108-229	9.8	12	110
230-298	16.0	11	58
299-416	19.5	23	95
417-525	29.4	32	77
526-672	38.6	56	91

(A. 5a).*

By January, 1982, 171 appointments to the position of Correction Lieutenant had been made from the list. Of these appointments, 17 appointments, constituting approximately 10% of the appointments, were minority.

* Numbers preceded by "A" refer to pages of the Appendix; those preceded by "SA" refer to pages in the Supplemental Appendix.

The Stipulation of Settlement

This lawsuit was commenced by way of an order to show cause signed January 15, 1982. Plaintiffs claimed that the examination was discriminatory because: (i) it resulted in a disproportionately low number of minority appointments; (ii) the results of the examination determined who could sit for the Captain's examination; and (iii) the examination was not job related (A. 2f).

Between January 19, 1982 and January 21, 1982, based on numerous telephone conversations, a settlement in principle was reached between plaintiffs and defendants as to the administration of a new Captain's examination and the use of plaintiffs' expert to develop new examinations for Lieutenant and Captain. The only issue then left for discussion was the possibility of "accelerated" promotions of minorities to permanent Lieutenant (Horowitz Affidavit, p. 2). These discussions resulted in the motion being adjourned *sine die* (SA. 1-2).

However, on February 17, 1982, plaintiffs again sought a temporary restraining order from the district court, which the court refused to sign, setting the matter down for argument on February 26, 1982. The district court heard argument on that day on plaintiffs' motion for preliminary relief, and adjourned the matter to March 17, 1982 for the parties to engage in discovery to determine if the hearing on the motion could be consolidated with the trial. Defendants answered the complaint in March 1982, by claiming that the challenged examination was job related and had been validated as a content valid examination.

The parties then engaged in discovery. Interrogatories were served and depositions taken. On March 17 and again on May 11, 1982 there were further conferences with the court concerning the progress of discovery and the selection of a hearing-trial date.

During the course of discovery, settlement discussions were resumed and the parties were able to reach an agreement in May 1982. Petitioners wrote to the district court about their desire to seek intervention in June 1982. A conference was held in July 1982, at which the parties and counsel for petitioners were present and the terms of settlement were discussed. In August 1982, the parties entered into a stipulation of settlement which was submitted to the district court for approval (A. 5c).

The settlement first established procedures for making interim appointments to Correction Lieutenant from eligible list 36-808. It provides that:

1. All the individuals on the list will be divided into three zones. Each zone shall be deemed to be a single score for purposes of making appointments. The size of the zones was based on a statistical computation of the standard error of measurement as discussed in *Guardians Association of N.Y.C.* v. *Civil Service*, 630 F.2d 79 at pages 102-103 (2d Cir. 1980).

2. Appointments from the list shall be made first from zone 1, then from zone 2 and finally from zone 3.

3. Within each zone, appointments shall first be made from eligible minority candidates, if minority candidates are available and willing to accept appointment, until mi-

norities constitute at least 21% of all appointments. Thereafter, minorities will be appointed within a zone in a proportion of one minority to four non-minority. However, once minorities within a zone have been exhausted, appointments will be made from the non-minority candidates remaining within the zone.

4. All eligibles shall be offered appointment until the list is exhausted (A. 8-9f).

The settlement next establishes procedures for the development and use of new, long term selection procedures for future promotions to Correction Lieutenant and Captain. These procedures include consultation with an industrial psychologist designated by plaintiffs, consideration of alternatives to a written test, and the possible use of alternatives to a written test, and the possible use of separate frequency distribution (A. 10-13f).

Notice of the proposed settlement was given pursuant to Rule 23. On September 29, 1982, a hearing was held at which the district court permitted non-minorities who were on the eligible list to intervene for the purpose of objecting to the terms of the settlement. Additional hearings were held on October 4 and 14, 1982 (A. 3-4a).

On November 9, 1982, the district court issued its order approving the Stipulation of Settlement. The court found that the settlement was fair, reasonable and lawful in all respects and that the objections to the settlement were without merit (A. 1d).

An opinion of the court was issued on December 1, 1982. The court reviewed the racial makeup of the eligible list

and appointments made from the list as of July 28, 1982 and September 29, 1982.* It found that the list was 22% minority, and that of the 222 appointments made as of July 28, 1982, only 9% were minority. The court found the discrepancy between this percentage and the percentage of minority appointments to be expected from a random selection was almost 6 standard deviations, and noted that under the holding in *Castaneda* v. *Partida*, 430 U.S. 482 (1977) a difference of more than two or three standard deviations establishes a *prima facie* case of discrimination (A. 9-10c).

The district court then examined the terms of the settlement and found two basic elements: (1) measures to adjust the present list to correct for disproportionate racial impact, and (2) development of new selection procedures for future lists (A. 10c).

The district court found that the settlement was a logical outcome of the *Kirkland Sergeants* litigation and that the *Kirkland Sergeants* case provided clear precedent for settlement in this case. Specifically, the district court stated that the Court of Appeals' approval in *Kirkland Sergeants* of an interim hiring ratio for minorities, pending the development of a new selection procedure, and the interim hiring ratio for minorities achieved by the State's voluntary departure from a strict "rank order" list by adjustment of minority candidates' scores, was precedent for the departure from the strict rank order agreed to in this case (A. 13-14c).

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* As of July 28, 1982, 222 appointments had been made from the list, and twenty of these appointments were minority (9%). And, as of September 29, 1982, 225 appointments had been made, including 23 minority, or approximately 9% (A. 9-10c).

The district court then concluded that the settlement was reasonable, since the relief provided to the plaintiffs was modest and tailored to plaintiffs' claims. In this regard, the district court found that the original rank-ordered list was based on score differences so slight as to be meaningless vis-a-vis actual job performance, and that ranking according to zones was a more realistic use of test scores. The district court also found that although random-ranking within zones would result in a "color-blind" list, random-ranking would provide no remedy for the disproportionate number of non-minority appointments *already made*, and that after trial, those appointments might have been revoked—clearly a more drastic remedy than the limited minority preference provided for in the settlement (A. 14-16c).

The district court structured the balance of its analysis pertaining to the reasonableness and legality of the settlement around intervenors' objections. It summarized those objections as follows: *first*, that no affirmative relief can be granted until after a full trial at which plaintiffs prove disproportionate impact, and a judicial finding is made as to the job-relatedness of the examination; and *second*, that even if the existing record justified some relief, the minority preference violated the Federal Constitution and State Civil Service Law (A. 16-17c).

The court rejected intervenors' first contention, finding that, because settlement is favored and accorded a presumption of validity (A. 17-18c), the issue to be resolved when a Title VII settlement imposes some detriment on non-minorities, is whether there is a reasonable basis for imposing such detriment (A. 21c). The court found such a

reasonable basis in the adverse impact of the examination and in the nature of the terms of the settlement. Also, the court held, that there is no requirement that a defendant rebut a *prima facie* case (A. 21-22c). As for the terms of the settlement, the district court found that in settling the case, the State is, in principle, engaging in an affirmative action plan, and that no judicial determination of constitutional or statutory violation is required as a predicate for such action (A. 23-25c).

The district court then dealt with intervenors' second contention: that the settlement violated New York State and Federal Law. The court found that the establishment of zones does not violate State law concerning "merit and fitness" (A. 26c); also that the settlement does not violate intervenors' due process or equal protection rights. Specifically, the district court found that the New York Court of Appeals has held that a person on an eligibility list has no property right in his position on that list and, therefore, that intervenors' due process claims are without merit (A. 27c). The district court also found that the settlement did not impose an unlawful quota because the preference was *interim* in nature and was tailored to the specific claims of the plaintiff class. Finally, the court found that the settlement did not unnecessarily "trammel" the interests of non-minority employees because it did not require the discharge of any non-minority employees, did not create an absolute bar to their advancement, is a temporary mesaure, and is intended to eliminate a racial imbalance (A. 30c).

The Court of Appeals upheld the district court both with respect to its limitation on intervention and the approval of the settlement agreement.

In its opinion, the Court of Appeals first dealt with the question of the limit of intervention granted to non-minorities by the district court. The Court rejected the intervenors' rationale that had they been granted judicial intervention, they would have had equal standing with the original parties and, therefore, that their consent to the settlement agreement would have been required. Instead, the Court of Appeals agreed with the reasoning of the district court that the sum of rights possessed by an intervenor depends on the nature of the intervenor's interest (A. 14a).

The Court of Appeals stated that the intervenors were non-minorities and non-minorities "do not have a legally protected interest in the *mere* expectation of appointments which could only be made pursuant to presumptively discriminatory employment practices." (A. 14a). Therefore, the legal rights of non-minorities are generally not adversely affected by reasonable and lawful race-conscious hiring or promotional remedies, whether imposed by the court following litigation on the merits or created by settlement (A. 14a). The interests of non-minorities in such a situation then involve whether or not the decree or agreement is unreasonable or unlawful, but do not require their consent as a condition to settlement.* The Court of Appeals specifically stated that to enable all intervenors in Title VII cases to veto proposed compromises "would certainly hamper efforts to settle Title VII cases." (A. 15a).

* The Court distinguished the intervenors from the union in *United States* v. *City of Miami*, 664 F.2d 435 (5th Cir. 1981) (En banc) because the decree in *Miami* bound the defendant union to a compromise which altered its contractual rights while the intervenors had no such contractual rights (A. 18-19a).

The Court of Appeals next reviewed the propriety of the district court's approval of the settlement agreement. The Court began by stating that "It is settled that voluntary compromise is a preferred means of achieving Title VII's goal of eliminating discrimination." (A. 20a). The Court held that when such a settlement employs race-conscious remedies, a court must address itself to two inquiries: (1) whether there is an existing condition which can serve as a proper basis for a creation of race-conscious remedies, and (2) whether specific remedies are unreasonable or unlawful. The Court then addressed each of these inquiries (A. 21a).

The Court of Appeals agreed with the district court that the statistical demonstration of the eligibility list's disproportionate racial impact established a *prima facie* case of Title VII discrimination. The Court rejected the intervenors' contention that a judicial determination that the examination was not job-related was required before a proper basis for settlement could exist. According to the Court, intervenors' argument "would turn Title VII law on its head since, as intervenors themselves concede, job-relatedness is never presumed and only becomes an issue after it is raised by the defendant." (A. 23a). The Court also held that requiring that no Title VII testing case could be settled until a judicial determination on the test's job-validity was made would seriously "undermine Title VII's preference for voluntary compliance." (A. 23a). The Court of Appeals expressly stated that neither Title VII nor the Constitution prohibits compromise agreements employing race-conscious remedies which are agreed to prior to judicial determination on the merits (A. 23a). The Court

held that defendants' entrance into a compromise without rebutting an established *prima facie* case amounts to an admission of unlawful discrimination for purposes of Title VII (A. 25a).*

As for the second inquiry concerning the reasonableness and the legality of the specific remedies of the settlement, the Court of Appeals held that the inquiry must be answered by measuring the terms of settlement against the allegations of the complaint and the relief which might have been granted if the case went to trial. The remedies must be related to the objective of eliminating the alleged instance of discrimination and must not unnecessarily trammel the interests of affected third parties (A. 28-29a). Applying that standard to this case, the Court of Appeal found that the settlement was reasonable and legal since the terms of the settlement substantially related to the objective of eradicating the discriminatory impact caused by the examination and are not overly oppressive to the interests of non-minorities (A. 29a).

Specifically, the Court of Appeals reviewed the future selection procedures provided by the settlement and found that these procedures operated solely to eliminate adverse impact and to assure compliance with Title VII in the future and did not trammel on any interests of any minorities (A. 29a). The Court recognized that small differences between the scores of candidates indicate very little about the

* With respect to the disclaimer of any admission of unlawful discrimination used in the settlement, the Court of Appeals stated that such disclaimer is used in many compromises of this nature to protect defendants from making themselves available to large back-pay awards. Therefore, the Court construed the disclaimers to be an admission that there is a statistical disparity together with a reservation of the right to explain in the future (A. 25a).

candidates' merits and fitness, that the zones contained candidates whose final scores differed by no more than four points, and that the size of the zones was based on a statistical computation of the likely error measurement. The zoning, therefore, was proper since it created a more valid measure to assess the test scores and eliminated the central cause of adverse impact, the rank ordering system. The Court of Appeals went on to state that since the zone system preserves some of the results of the examination where an employer could have resorted to random selection from within the entire group, the use of zones may have had the least detrimental effect to the interest of minority candidates who obtained higher test scores (A. 30-31a).

The Court of Appeals rejected the intervenors' contention that use of zones deprives intervenors of vested property rights without due process of law. The Court referred to the New York Court of Appeals holding in *Cassidy* v. *Municipal Civil Service*, 37 N.Y.2d 526, 529 (1975) where the New York Court of Appeals held that a person on an eligibility list does not possess any mandated right of appointment or any other legally protected interest. The Court of Appeals below went on to state "the only relevant state right intervenors possess is the right to challenge the settlement on the ground that the manner in which it provides for appointments is unlawful, arbitrary, and capricious, or constitutes an abuse of discretion," which rights intervenors had exercised in the district court (A. 31-32a).

Finally, the Court of Appeals found that the race-conscious appointment procedures envisaged by the settlement were not unreasonable or illegal. The Court found that interim race-conscious procedures are acceptable when (1)

they mandate the appointment of members of the plaintiff class who are victims of the discriminatory practice and (2) they calculate the number of victims to be appointed by reference to the percentage of victims in the total applicant pool (A. 32-33a). According to the Court, "because such interim selection procedures do not go beyond the simple elimination of the challenged practice's disparate impact, they are not unlwaful quotas, and are justified whenever a Title VII violation has occurred." (A. 33a). The Court of Appeals reviewed the appointment procedures set forth in the settlement and found that they met these two criteria (A. 33-34a).

Summary of Argument

The Court below held that the Stipulation of Settlement entered into between minority plaintiffs and the New York State defendants, which resolved a Title VII class action litigation involving a promotional examination, was properly approved by the district court. The basis for the Court of Appeals' holding was that a *prima facie* case of discrimination was established by reason of a statistical disparity and that the terms of the settlement were fair, reasonable and legal in all respects.

Petitioners argue that a *prima facie* case is an insufficient and legally infirm basis upon which to settle a Title VII case and that there is a need to establish standards upon which to base settlement of Title VII litigation. However, courts, including this Court, have uniformly held that a *prima facie* case of discrimination is a proper basis for settling Title VII litigation. The standards which the courts have applied is that the terms of the settlement be

fair, reasonable and legal. The appeals court holding is, therefore, in no way unusual and certiorari should be denied.

ARGUMENT

The Court of Appeals Properly Upheld the Stipulation of Settlement Because a *Prima Facie* Case of Discrimination Has Been Clearly Established and the Settlement Reached Is Fair, Reasonable and Legal in All Respects.

The courts have consistently held that any settlement of a Title VII action shall be approved where a *prima facie* case of discrimination has been established and where the terms of the settlement are fair, reasonable and legal. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974); *Plummer* v. *Chemical Bank*, 668 F.2d 654 (2d Cir. 1982); *Patterson* v. *Newspaper & Mail Deliverers' Union of N.Y. & Vicinity*, 514 F.2d 767 (2d Cir. 1975). In this case, as the Court of Appeals held, a *prima facie* case was established and the terms of the settlement were fair, reasonable and legal.

Here, the *prima facie* case was established by statistical evidence. It is now beyond dispute that a *prima facie* case of discrimination, which satisfies the plaintiff's burden of coming forward with evidence, is established by showing that the challenged practice, while race-neutral on its face, nonetheless has a disproportionate impact on a particular class. *Teal* v. *Connecticut*, 645 F.2d 133, 137 (2d Cir. 1980), *aff'd*, 457 U.S. 440 (1982); *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. Moody*, 422 U.S. 405

(1975); *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1970). A showing of adverse impact can be, and typically is, established by statistical evidence.

Where, as here, objections to settlement of a Title VII class action are raised by non-minorities whose interests will be affected by "benefits" granted to plaintiffs, the standard to be applied is that the terms of settlement must not be unreasonable or illegal. In applying this standard, reasonableness is considered in the context of whether or not the relief violates the non-minorities' rights under the Fourteenth Amendment of the United States Constitution. *United States* v. *City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (en banc); *United States* v. *City of Alexandria*, 614 F.2d 1358, 1362-1363 (5th Cir. 1980).* In applying the standard to this case, then, the issue to be decided is whether the settlement violates either Federal or New York State law. As the Court of Appeals found, it did not.

Petitioners contend that terms of the settlement violate the Equal Protection clause of the United States Constitution and deprive them of vested property rights without due process of law. As the Court of Appeals found, both claims are without merit.

Petitioners' equal protection argument—that the race-conscious terms of the settlement constitute illegal, reverse

* Petitioners' reliance on the fact that certiorari was granted in *Memphis Fire Department* v. *Stotts*, 679 F.2d 541 (6th Cir. 1982), *cert. granted*, —— U.S. ——, 77 L. Ed. 2d 1331 (1983), to support their contention that certiorari should be granted in this case is misplaced. While *Stotts* is a Title VII case involving public employees which was settled, this Court granted certiorari only on the issue of the district court's authority to modify the consent decree and denied certiorari on the issue of the rights of non-minorities to intervention.

discrimination—must fail in light of the standards set forth in the cases dealing with affirmative action plans. First, an employer must demonstrate that such a plan was adopted for the purpose of remedying a past racial imbalance in its work force. *United Steelworkers of America* v. *Weber*, 443 U.S. 193, 208 (1979). The employer's burden of showing a remedial purpose is met by showing that a plan was entered into as part of a settlement in a Title VII action. *Setser* v. *Novak Investment Co.*, 657 F.2d 962, 968 (8th Cir. 1981). Second, the remedy should not "unnecessarily trammel the interests of white employees" (*Weber*, 443 U.S. at 208), or, in other words, is a "reasonable" remedy. *City of Miami*, 614 F.2d at 1338; *Prate* v. *Freedman*, 583 F.2d 42 (2d Cir. 1978). As the Court of Appeals found, this settlement is eminently reasonable because (1) it ameliorates the past disproportionate impact of the examination without extending benefits to minorities beyond the plaintiff class, and (2) its detrimental impact on non-minorities is modest, especially relative to the detriment which might have resulted from a remedy imposed after trial.

The benefit to plaintiffs' class from the settlement amounts to reducing the adverse impact of the examination by the creation of zones and providing for race conscious hiring from within zones. However, when there are no minorities remaining in the zone eligible for appointment, non-minorities will be appointed even though this causes the proportion of minority appointees to fall below 21%.* Clearly, this relief is directly related to plaintiffs' claims

* It should be noted that since the proportion of minorities hired will fluctuate under the terms of the settlement, the settlement sets forth hiring goals and not quotas.

that the examination was discriminatory because a disproportionately low number of minorities had been appointed. Also, since the settlement does not completely eliminate the adverse impact of the examination on plaintiffs, the relief is modest.

As for any detriment to non-minorities on the list, first it must be recognized that the settlement benefits—in fact gives priority treatment to—certain of the non-minorities. Specifically, it provides, as the district court noted, that *all* non-minorities who have already received appointments, some 200 people, comprising 91% of those appointed to date, will continue to hold their appointments and the superior benefits afforded by those appointments. In addition, since the settlement requires that all persons on the eligible list receive an offer of appointment, non-minorities at the lower end of the list will have the opportunity of appointment assured as positions become available in the future.

As to petitioners' contention that no delay is warranted if the examination is job-related, it ignores the teaching of *Weber*, 443 U.S. 193, that affirmative action plans are constitutional.* In addition, it ignores the teaching of *Albemarle, supra*, 422 U.S. 405, that after a defendant has established that an examination is job-related, the case is not

* In this context, it should be noted that the Second Circuit has not yet held an examination to be job-related where the examination had an adverse impact and where the validation was a content validation. *Guardians Association* v. *Civil Service*, 630 F.2d 79 (2d Cir. 1980); *Jones* v. *N.Y.C. Human Resources Administration*, 528 F.2d 696 (2d Cir. 1976); *Kirkland* v. *N.Y.S. Dept. of Correctional Services*, 520 F.2d 420 (2d Cir. 1975); *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973); *Bridgeport Guardians* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973); *Chance* v. *Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972).

over because then the plaintiff still has the opportunity to establish the availability of an alternative selection procedure which would have had less adverse impact. A number of Circuit Courts have struck down selection procedures where alternatives existed which had less adverse impact. In *United States* v. *Bethlehem Steel Corporation*, 446 F.2d 652 (2d Cir. 1971), the Court of Appeals modified seniority and transfer systems, holding that "[i]f the legitimate ends of safety and efficiency can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued." *Id.* at 662. Again in the case of a seniority system, the Fourth Circuit held "[t]here must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential racial impact." *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 798 (4th Cir. 1971). See also, *Blake* v. *City of Los Angeles*, 515 F.2d 1367 (9th Cir. 1979), *cert. denied*, 446 U.S. 928 (1980); *Horace* v. *City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980); *Williams* v. *Colorado Springs, Colorado School District*, 641 F.2d 835 (10th Cir. 1981).

As for petitioners' due process claim, it is based on a misapprenhension of the law. Petitioners conclude, from the fact that New York law holds that they have an interest in the eligible list, that due process entitles them to defend the validity of the examination. No such conclusion can be drawn. The extent to which intervenors are entitled to due process depends entirely on how New York law defines their interest. *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

And, nowhere in New York law is there any holding that persons who feel themselves to be aggrieved by State action can put themselves in the shoes of the State.

Indeed, a case relied upon by intervenors, *Burke* v. *Sugarman*, 35 N.Y. 2d 39 (1974) (Althiser Petition at 21), defines the limits of intervenors' right. The only "right" that intervenors can derive from Burke is the right to challenge the settlement on grounds that the manner in which appointments will be made under its terms is contrary to law, arbitrary and capricious, or constitutes an abuse of discretion. As the Court of Appeals held, petitioners have already exercised that right in the district court.

Petitioners contend that the terms of the settlement violate New York State law. The terms of which they complain are zoning and race conscious appointments within zones. According to petitioners these terms violate the "merit and fitness" requirements of New York State's Constitution and Civil Service Law and the "rule of three" in the Civil Service Law. Petitioners are wrong. The terms of the settlement comply with New York law in all respects.

The "merit and fitness" requirements of New York law are that promotion shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive. New York State Constitution, Article 5, § 6; Civil Service Law, § 50. As the district court recognized, it is the zoning provisions of the settlement which relate to these "merit and fitness" requirements since it is zoning which changes the use of the results of the examination. And, as

the court held, zoning does not violate "merit and fitness" principles.

Specifically, the determination of what constitutes merit and fitness, and when and how it can be tested for, is vested in the Civil Service Commission. See *People ex rel. Buckley* v. *Roosevelt*, 19 App. Div. 431 (1st Dept. 1897); *Matter of Fitzgerald* v. *Conway*, 275 App. Div. 205 (3d Dept. 1949), *appeal denied*, 299 N.Y. 798 (1949). Here, the Commission had determined, when it certified the list in December 1981, that all those who passed Examination 36-808 met the requirements of merit and fitness. Since only those who passed the examination will be grouped in zones, the determination of the Commission concerning merit and fitness remains unchanged.

As for the requirements of competitiveness, it means simply that the results of an examination must be arrived at by use of an objective standard, capaable of review, and not by the subjective standards of the examiner. *Matter of Fink* v. *Finnegan*, 270 N.Y. 356 (1936); *Matter of Andresen* v. *Rice*, 277 N.Y. 271 (1938). The Civil Service Commission has broad discretion in determining what constitutes a competitive examination. *Matter of Katz* v. *Hoberman*, 28 N.Y. 2d 530 (1971); *Matter of Mitchell* v. *Poston*, 41 A.D. 2d 886 (4th Dept. 1973). And, various formulas can be used to determine the scores which measure objective standards. *Matter of Robbins* v. *Schechter*, 7 Misc. 2d 436 (Sup. Ct. N.Y. Co. 1957), *aff'd*, 3 A.D. 2d 1010 (1st Dept. 1957), *aff'd*, 4 N.Y. 2d 935 (1958); Section 67.1 of the President's Regulations, 4 NYCRR 67.1. Here, the zones, devised by a statistical formula, are an objective standard of measuring the results of the examination. They are, therefore, competitive.

As for the contention that the settlement violates the "rule of three", intervenors misstate the law. Intervenors state that "pursuant to Title 4 NYCRR § 4.2(a), appointments are made from among the top three ranking candidates on the eligible list" (Althiser Petition at 20-21). The language of § 4.2(a), on its face, is to the contrary. Section 4.2(a) states that a promotion may be made to any person on an eligible list whose final rating in the examination is equal to or higher than the rating of the third highest person on the list.* Therefore, if there are more than three people, be there four or a hundred, with the same final score and that score is equal to or higher than the final score of the third highest person on the list, any one of those people can be appointed.

The rule set forth in NYCRR § 4.2(a) is provided for in Civil Service Law, § 61, which is the source of the "rule of three". The purpose of the statute was to expand rather than restrict the appointing officer's choice and thus to insure that appointing officers, in fact, had the power of appointment. *People ex rel. Balcom* v. *Mosher,* 163 N.Y. 32 (1900). To that end, the statute further provides that the Civil Service Commission may provide, by rule, that where persons on an eligible list have the same final examination ratings, promotions may be made by the selection of any of those individuals. Section 4.2(a) of the Rules is the rule which has been adopted. The rule serves to en-

* The specific language of 4 NYCRR § 4.2(a) concerning appointments is:

> ". . . appointment or promotion to a position in the competitive class shall be made by the selection of a person on the appropriate eligible list willing to accept such appointment and whose final rating in the examination is equal to or higher than the rating of the third highest ranking eligible on the list indicating willingness to accept such appointment."

sure that mechanical "ranking" by a uniform impartial system *not* have the restrictive impact that petitioners claim is mandated. Here, the use of zones wherein all candidates have the same rating for purposes of appointment is in full accord with the purposes of the rule of three.

Petitioners also claim that changing the list violates their New York State due process rights. As the Court of Appeals held, that claim is without merit. In addition, the Commission regularly changes lists in its review of examinations. *Matter of Adolph* v. *Dept. of Personnel*, 71 Misc. 2d 68 (Sup. Ct. N.Y. Co. 1972), *aff'd*, 41 A.D. 2d 713 (1st Dept. 1973), *aff'd*, 33 N.Y. 2d 993 (1974); *Matter of Sullivan* v. *Taylor*, 285 App. Div. 638 (1st Dept.), *aff'd*, 309 N.Y. 927 (1955). And, as noted below, it does so in the context of settlements. The Commission has the clear and unmistakable power to take appropriate action to correct errors. *Katz* v. *Hoberman, supra; Mitchell* v. *Poston*, 41 A.D. 2d 886 (4th Dept. 1973). Such corrective action may include, for example, deletion of questions or acceptance of alternative correct answers, *Adolph, supra;* changing the passing grade, *Mulkeen* v. *Bronstein*, 75 Misc. 2d 110 (Sup. Ct. N.Y. Co.), *aff'd*, 43 A.D. 2d 664 (1st Dept. 1973); giving a supplemental test to some candidates, *Mitchell, supra.*

Indeed, petitioners acknowledge that the Civil Service Commission has the authority to alter eligible lists; they merely argue that the Commission cannot alter the list in this particular case (Althiser Petition at 21). It is axiomatic that under New York law the standard to be applied as to whether or not a State agency can exercise its authority is whether or not there is a "rational basis" for the agency action. *Colton* v. *Berman*, 21 N.Y. 2d 322

(1967); *Fink* v. *Cole,* 1 N.Y. 2d 48 (1956); *Diocese of Rochester* v. *Planning Board of Town of Brighton,* 1 N.Y. 2d 508 (1956); *Stork Restaurant, Inc.* v. *Boland,* 282 N.Y. 256, 274 (1940). Here, where the results of the examination had adverse racial impact and the use of zones ameliorates the standard error of measure with the concomitant effect of ameliorating the adverse racial impact of the examination, the use of zones is, at the very least, rational.

The fact that zones have been established in the context of settlement, after the list had been established, in no way invalidates the stipulation. Eligibility lists can be changed in the context of settlement. *Matter of Mena* v. *D'Ambrose,* 58 A.D. 2d 514 (1st Dept. 1977); *Mulkeen* v. *Bronstein, supra,* 75 Misc. 2d 110, *aff'd,* 43 A.D. 2d 664.

The fact that the settlement provides for race conscious hiring within the zones does not, as petitioners argue, render the settlement illegal under New York law. Both article 6, § 5 of the New York State Constitution and the Civil Service law including the "rule of three" are silent regarding the basis on which the appointing officer is to select from the list of individuals certified as having satisfied the merit and fitness requirement. As for the equal protection clause of the State Constitution, N.Y.S. Const. Art. 1, § 11, that clause affords the same breadth of coverage as the equal protection clause of the Fourteenth Amendment to the United States Constitution. *Dorsey* v. *Stuyvesant Town Corp.,* 299 N.Y. 512 (1949), *cert. den.,* 339 U.S. 981 (1950). The applicable considerations are, therefore, those set forth in *Weber,* 443 U.S. 193, which considerations, intervenors concede, allow for race con-

scious hiring (Althiser Petition at 10). In addition, race conscious hiring within zones is in accord with New York State's policy of affirmative action. See Executive Order 40.1, 9 NYCRR § 3.40.

Reliance on *Ruddy* v. *Connelie*, 61 A.D. 2d 372 (3d Dept. 1975), for the proposition that a minority preference may not be granted is misplaced. The holding in *Ruddy* was based on the court's finding that there was no suggestion that the examination was inherently disadvantageous to minorities. *Id.* at 375. Furthermore, the appointing officer in *Ruddy* simply decided to appoint specific numbers of minority and female eligibles without in any way relating that decision to the actual configuration of the list.

Here, the record demonstrates that the examination had a disparate racial impact. In addition, the minority preference provided by the settlement is limited by the zone structure, as minorities are reachable only if there are fewer than three available eligibles remaining in the next higher zone. Thus, the use of zones regroups the examination results on the basis of this Court's analysis in *Guardians*, rather than disregarding them, and follows Civil Service principles, unlike the affirmative action plan in *Ruddy*.

Since the Stipulation of Settlement was based on a *prima facie* case of discrimination and the terms of the settlement were both reasonable and legal, the Court of Appeals properly upheld the settlement. Certiorari, therefore, should be denied.

Conclusion

The Petition for a Writ of Certiorari Should Be Denied.

Dated: New York, New York
December 22, 1983

Respectfully submitted,

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State of New York
Attorney for Respondents

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Appeals and Opinions

BARBARA B. BUTLER
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Assistant Attorneys General
Of Counsel

SUPPLEMENTAL APPENDIX

Affidavit of Ann Horowitz

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

82 Civ. 295

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

against

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

State of New York)
County of New York) ss.:

ANN HOROWITZ, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of ROBERT ABRAMS, Attorney General of the State of New York, attorney for defendants herein. I am familiar with the facts set forth herein and make this affidavit on personal knowledge in order to clarify the nature and extent of discussions between members of this office and counsel for plaintiffs.

2. Between January 19, 1982 and January 21, 1982, numerous telephone conversations were had between Assistant Attorney General Judith Gordon and/or myself and

D. Peter Sherwood, counsel for plaintiffs. I have spoken with Ms. Gordon regarding those conversations between Ms. Gordon and Mr. Sherwood to which I was not a party, and am able on that basis to make statements concerning the substance of those conversations. As a result of those conversations, Ms. Gordon and I understood that a settlement in principle had been reached as to administration of a new Captain's examination within a timeframe acceptable to plaintiffs, consultation with an expert designated by plaintiffs in the development of new examinations for lieutenant and captain, and payment of a fee to plaintiffs' expert. It was our belief that the only issue left for discussion was the possibility of "accelerated" promotions from the eligible list of minorities to permanent lieutenant positions. This issue was not raised until after tentative agreement on the other issue had been reached. Mr. Sherwood was advised that it was unlikely that defendants could agree to any sort of "accelerated" promotions.

3. On January 21, 1982 I advised Mr. Sherwood that 171 permanent appointments from the eligible list had been made, and that 17 of those appointments had been made to minorities. Later that day, Mr. Sherwood advised us that, based on the agreement in principle reached at that point, he would adjourn plaintiff's first motion for a preliminary injunction *sine die*.

4. Discussions concerning the details of settlement continued after January 21, 1982. At no point in settlement discussions, either before or after January 21st, did Mr. Sherwood raise the issue of retaining provisionals in place after permanent appointments had been made.

5. On February 16, 1982 Mr. Sherwood telephoned me at approximately 4 p.m. and asked me whether it was true that the provisional status of the provisional lieutenants was being terminated effective February 17, 1982. I confirmed that provisional status of all lieutenants was being terminated effective at the close of business on the 17th. Mr. Sherwood then advised me that he would be seeking a TRO from this Court on February 17, 1982 restraining defendants from interfering with the provisional lieutenant status of any of plaintiffs' purported class.

6. I would also like to address and clarify several points in Mr. Sherwood's affidavit dated February 16, 1982. I have been advised by the Department of Correctional Services that some candidates for the lieutenant exam were not sergeants and thus the reference in paragraph 3 should be to candidates, not sergeants, who sat for the exam. Similarly, not all provisional lieutenants were permanent sergeants. (See Sherwood Affidavit, ¶8). They have therefore been returned to their permanent hold items, some of which are not sergeant items. Finally, it should be noted that the sheet showing distribution of minorities within score ranges was provided to Mr. Sherwood with the caveat that it was subject to revision due to factors such as subsequent disqualifications (insufficient time in title), and errors in computation of veterans credits.

/s/ Ann Horowitz

Ann Horowitz

Sworn to before me this
24th day of February, 1982

/s/ Barbara B. Butler

Assistant Attorney General
of the State of New York

No. 83-672

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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On Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

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BRIEF IN OPPOSITION

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STATEMENT*

Petitioners are individual white

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*/ We have included this brief description of the facts and the proceedings

corrections officers who were permitted to intervene in a suit brought by Edward Kirkland and other minority corrections officers challenging the selection procedures used to promote officers from the rank of sergeant to lieutenant.

Promotion to lieutenant is accomplished through appointment from a list of eligibles. The list of concern in this case was based on the results of an examination administered in October 3, 1981. Of the approximately 739 candidates who took that test, 570 were white and 169 were minority. Of this number 527 white and 148 minority officers passed (App.

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*/ continued

below, because of the many inaccuracies and misleading statements contained in the petition.

9c).[1] Contrary to petitioners' assertion (pet. at 3), disproportionate impact existed even at the pass-fail level.[2]

Based on the examination results, the eligibles were ranked according to their scores, adjusted for seniority and veteran's credits, if applicable.[3] The effect of the list's rank-ordering was to maximize the disparate racial impact of the examination (App. 5a n.3).

On the first round of promotions based on this list, the New York State Department of Correctional Services ("DOCS") made 171

1/ Reference is to the pages of appendices that follow the petition.

2/ See Affidavit of Dr. James L. Outtz, dated October 15, 1982, paragraph 10. This affidavit contained expert testimony, offered by the plaintiffs below and admitted by the district court, demonstrating the adverse impact and lack of job-relatedness of the examination.

3/ The addition of these credits did not play a significant role in the resulting disparate impact (App. 5a, 27a).

appointments, of which only 17, or close to 10%, were minority, despite the fact that over 22% of the candidates who sat for the exam were minority. As further appointments were made the percentage of minority appointments decreased: by July 28, 1982, DOCS had made 222 appointments and only 9%, or 20, were minority (App. 6a).

Several months after the filing of the complaint in January 1982, after conducting discovery and holding several negotiation sessions, the parties were able to reach a settlement. The attorney for petitioners participated in the settlement conference with the court and, indeed, indicated that he approved of the outlines of the settlement (App. 2-3e). The settlement had two basic elements: provisions to lessen the adverse impact of the existing selection process and provisions for the development of a new, non-discriminatory selection

procedure. The settlement did not prohibit all use of the examination results, thus appointments already made were not disturbed, and white officers, although alleged by plaintiffs to have been wrongfully promoted at the expense of minority officers who passed the examination, retained their positions and suffered no detriment.

The purpose of the settlement was to provide equal opportunity and eliminate the disadvantage for minorities that resulted from the use of the examination (App. 3f ¶7). In order to diminish the adverse impact resulting from the exam and the list, the settlement modified the rank-ordering of the list, by placing candidates into three zones, based on their final scores (App. 8-9f). All candidates within a given zone were deemed to be of

equal fitness for promotion.[4/] Under the settlement, appointments from within a zone are first offered to minority eligibles until minority appointments reflect the proportion of the eligible pool which is minority, or 21%, of the total appointments. After that point, appointments are to be made in a ratio of one minority to four non-minority[5/] (App. 9f).

4/ Each zone contained candidates whose scores differed by no more than four points (App. 30a). The size of the zones was not arbitrarily chosen but rather, as the appellate court noted, "... was based on a statistical computation of the likely error of measurement inherent in Exam 36-808...."(App. 31a). the parties originally considered a random ranking within each zone; however, the original rankings were retained to satisfy the concerns of the petititoners (see transcript of Sept. 29, 1982 hearing at pp. 29-30, 47-52).

5/ The percentage and ratio are not absolute. If no minority candidate who is within the zone from which selections are being made desires to serve at the facility where there is a vacancy, the appointment is offered to a non-minority candidate, regardless of whether the

However, no minority eligible who falls within a lower zone will be promoted ahead of any candidates, regardless of race, within the highest unexhausted zone (App. 9a).

The court of appeals found zone-scoring an ideal method of accomplishing the settlement's modest purpose, without substantially burdening non-minorities:

> [T]he adjustment was a proper means of compliance with Title VII since, by creating a more valid method to assess the significance of test scores, it eliminated the central cause of the adverse impact, i.e., the rank-ordering system, while assuring promotion on the basis of merit. In fact, the rank-ordering system permissibly could have been modified to produce a result more disadvantageous to [petitioners].... Thus, the creation of a tiered zone system ... may have the least detrimental effect on the

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5/ continued

desired percentage has been reached (App. 9a). In addition, the district court noted the ease with which the modest 21% goal would be met (App. 12c).

> interests of non-minority candidates who obtained high test scores.

App. 31a.

Plaintiffs had made out a prima facie case, by showing that the selection procedure had an adverse impact on minorities (App. 25-27a). While defendants initially sought to defend the use of the test as job-related, they came to recognize that they were unlikely to prevail. In fact, the state had vigorously defended a similar case and lost. See, Kirkland v. New York State Department of Correctional Services, 374 F. Supp. 1361 (S.D.N.Y. 1974), aff'd in part and rev'd in part, 520 F.2d 420 (2d Cir. 1975), cert. denied, 429 U.S. 823 (1976), on remand, 482 F. Supp. 1179 (S.D.N.Y.) aff'd, 628 F.2d 796 (2d Cir. 1980), cert. denied, 450 U.S. 980 (1981). The outcome of that prior case served as one of the underpinnings of the settlement, i.e., that a written test cannot make the

kind of fine distinctions in candidate qualifications that would justify a rank-ordered list. (App. 30-31a) The petitioners failed to proffer any evidence to support either the validity of the exam or the use of rank-ordering.[6/]

The district court's approval of the settlement came only after all persons who might be affected by the settlement, including petitioners, received notice and were afforded an opportunity to be heard (App. 10a). Petitioners were allowed to intervene for purposes of objecting to the settlement. The district court examined

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6/ Were the state to have unilaterally chosen to use zone scoring in order to derive an eligibility list, petitioners would have no cognizable claim (see App. 18a: state law affords "wide discretion" on modification of procedures" to determine merit and fitness"). The fact that the state initially used rank-ordering and subsequently adopted zone-scoring does not alter the situation.

the settlement to determine whether it was fair and reasonable and then considered the objections raised by the petitioners and rejected them. (App. 27-30c). The only effect of the limitation on the scope of intervention was to prevent petitioners from forcing the state to engage in the futile act of a full trial on the merits (App. 25c). The district court's approval of the settlement was affirmed on appeal, based on the Second Circuit's holding that, after noting the interim nature of the race-conscious promotional procedures, the remedies were "sustantially related to and do not go beyond the goal of eliminating [the exam's] adverse impact" (App. 34a).

ARGUMENT

I. THE DECISION BELOW IS CONSISTENT WITH THE CONGRESSIONAL POLICY FAVORING VOLUNTARY SETTLEMENT OF TITLE VII SUITS

"Cooperation and voluntary compliance

were selected as the preferred means of achieving [the goal of eliminating discrimination]." Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974). This Court more recently affirmed that view in Carson v. American Brands, Inc., 450 U.S. 79, n.14 (1981).[7/]

In Carson the Court held that a court's refusal to approve a consent decree was an appealable order, based not only on this Court's view of the importance of voluntary settlements, but also because the effect of such a refusal was to force the parties to the decree to proceed to trial. 450 U.S at 87. Here too, the petitioners sought to force the parties to

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7/ See also Ford Motor Co. v. EEOC, 458 U.S. 219, 228 (1982); Occidental Life Insurance v. EEOC, 432 U.S. 355, 368 (1977).

assume the costs and uncertainties of litigation.

The court of appeals in the instant case undertook to examine the settlement for reasonableness and to measure the relief obtained by the settlement against the the relief that might have been ordered had the case proceeded to trial (App. 28a). The Second Circuit concluded that the rank-ordering system could have been modified even futher, producing a result "more disadvantageous" to petitioners (App. 31a). The appellate court also recognized that tne settlement did not go as far as it could have, since no backpay was provided and appointments of white officers that had been made were not rescinded (App. 11a). To adopt the position urged by petitioners would sound the death knell for voluntary compliance and Title VII settlements.

II. THE DECISION BELOW IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS

A. The Decision Below is Consistent With the Principles Announced in Bakke and Fullilove

Petitioners imply that the decision below is in conflict with this Court's decisions in Regents of the University of California v. Bakke, 438 U.S. 265 (1978) and Fullilove v. Klutznick, 448 U.S. 448 (1980). While they fail to point out any direct conflict between those decisions and the decision below, it is petitioners' contention that a public employer may never enter into a pre-trial settlement that provides a race-conscious remedy, even where the employer is faced with overwhelming evidence of discrimination and the remedy is specifically tailored to the violation alleged. Under the facts in this case, the principles handed down in Bakke

and Fullilove support rather than vitiate the decision below.

The instant case simply does not involve a racial preference without regard for qualifications, as did the university program considered by the Court in Bakke. The zone-scoring remedy in this case was adopted to cure "established inaccuracies in predicting ... performance." 438 U.S. at 306 n.43; see also, n.4, supra. The action taken by courts below, instituting a race-conscious remedy after review of a "well substantiated claim of racial discrimination", is consistent with the teachings of Bakke.[8/]

8/ The Court there reaffirmed the validity of Title VII consent decrees. 438 U.S. at 302 n.41. The parties appropriately took steps that were "reasonably necessary to assure compliance" with federal law. Fullilove v. Klutznik, 448 U.S. at 483.

Plaintiffs below made a considerable statistical showing of disparate impact, and offered evidence through an expert that tended to show the test was not job-related. The facts brought forward by plaintiffs provided a reasonable basis for a settlement, which was then subject to court review. Based on that showing, the district court could, and did, properly infer discrimination (App. 22c), because such disparity, "if otherwise unexplained" was likely to have resulted from "impermissible factors". Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). The lack of any evidence that the examination was job related, or that rank-ordering based on the examination was justified, necessitated the implementation of a remedy for what amounted to a violation of Title VII.

B. The Decision Below is Consistent With Those of Other Circuits

Courts have often approved settlements involving governmental employers which mandate race-conscious memedies, even though no findings or admissions of liability have been made. See, e.g., United States v. City of Miami, 664 F.2d 435 (5th Cir. 1981); Moore v. City of San Jose, 615 F.2d 1265 (9th Cir. 1980); Sarabia v. Toledo Police Patrolman's Ass'n, 601 F.2d 914 (6th Cir. 1979); United States v. City of Jackson, 519 F.2d 1147, 1150 (5th Cir. 1975); Erie Human Relations Comm'n v. Tullio, 493 F.2d 371 (3rd Cir. 1974). Defendants are under no obligation to seek to rebut plaintiffs' prima facie case. See City of Miami, 664 F.2d at 453. Further, third parties are not entitled to force defendants to mount a defense. See Airline Stewards and Stewardesses Ass'n,

Local 550 v. American Airlines, Inc., 573 F.2d 960, 963-64 (7th Cir. 1978).

III. THIS CASE DOES NOT RAISE QUESTIONS PERTAINING TO SECTION 703(h) NOR DOES IT RAISE ISSUES SIMILAR TO THOSE PRESENTED BY CASES PENDING IN THIS COURT

Contrary to petitioners' argument (pet. at 12), Section 703(h), 42 U.S.C. § 2000(e)(h) (App. 2g), simply does not insulate the results of the selection procedure at issue. Section 703(h) provides, in part that an employer may act upon the results of any professionally developed ability test, but only where the "test, its administration or action upon the results is not designed, intended or used to discriminate ...."

As the Court noted in Connecticut v. Teal, 457 U.S. 440, (1982), this section means that it is only "tests that were job related, [which are] permissible despite

their disparate impact." Id. at 452.[9/]

Nor is the eligibility list the equivalent of a seniority system as petitioners would like to imply (see pet. at 19). Longevity plays virtually no role in the promotional process (App. 5a n.2). The list was not the product of collective bargaining, nor did the list create vested rights (App. 31a).[10/] This is not a case, therefore, in which expectations based upon collectively bargained seniority

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9/ As noted earlier, the district court's judgment was based on more than disparate impact. Supra, nn.2, 4.

10/ Thus, the instant case bears no relationship to the situation presented by Memphis Fire Department v. Stotts, 679 F.2d 541 (5th Cir. 1982), cert. granted, ___ U.S. ___, 88 L.Ed.2d 1331 (1983). Stotts involves the question of whether a district court has the power to prohibit layoffs in accordance with a last-hired, first-fired seniority system, pursuant to an earlier consent decree.

rights must be harmonized with the remedial requirements of Title VII. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747 (1976). While the court of appeals recognized that petitioners had a right to be heard, the appellate court noted that an interest in protecting the "expectation of promotion pursuant to possibly discriminatory selection procedures" was not the sort of interest that made the consent of the petitioners essential (App. 19a).

Finally, the petitioners urge this Court to grant review so that it can examine an asserted conflict with state law (pet. at 20-24). Since the brief in opposition to be filed on behalf of respondents DOCS will probably address this argument in detail, we simply note that both lower courts have examined this contention and were unpersuaded by this claim.

Further, the Attorney General of the State of New York disagrees with petitioners' interpretation of New York law (App. 6f, ¶ 14; 18-19a; 26c).

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

December 19, 1983

Respectfully submitted,

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No. 83-672

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONSE OF McCLAY *et al.*, RESPONDENTS, IN SUPPORT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-672

FREDERICK E. ALTHISER, et al.,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al.,

Respondents.

Response of McClay et al., Respondents, in support of Certiorari

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A petition for a writ of certiorari in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 24th day of October, 1983, by

Frederick E. Altheiser, et al., as Petitioners.

A copy of the aforesaid petition was received on October 26, 1983, by Messrs. Beck, Halberg and Williamson, who were and are legal counsel for a group of white Correctional Department Officers of the State of New York (designated in the proceedings below as the "Robert J. McClay, et al., Intervenors-Appellees-Appellants" herein "the McClay Respondents").

This response is submitted in support of the position of the petition for certiorari filed by the Frederick E. Althiser, et al., Petitioners, pursuant to the authorization granted by Rule 19.6 of the Rules of the Supreme Court of the United States.

The McClay Respondents, like the Altheiser Petitioners, are white

Correctional Department Sergeants of the State of New York who passed a promotional, civil service examination given for the position of Correction Department Lieutenant. A class action was instituted by minority officers who likewise took the promotional examination. The action was settled by the plaintiffs and the New York officials, but without the consent of the white officers who had passed the test and intervened in the courts below. The settlement deprived the intervenors of their right to appointment in rank order of their test scores, and also of the protection of the New York civil service laws and regulations and collective bargaining agreement rights. The settlement granted priority in the order of appointments to minority officers, even though their test scores

were lower than those of their white colleagues. The petition of the Altheiser intervenors reviews the record facts, states the reasons for granting the writ; and presents the questions which allow for a full review of the constitutional and other important legal issues that deserve review in the general public interest by this Honorable Court. The legal position of the McClay Respondents is identical to that of the Altheiser petitioners.

We therefore respectfully ask that the writ of certiorari be granted.

Respectfully submitted,

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No. 83-672

IN THE

Supreme Court of the United States

October Term, 1983

FREDERICK E. ALTHISER, *et al.*,
Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,
Respondents.

REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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Dated: January 13, 1984

Parties.

A full listing of all parties appears at pages ii and iii of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit, now on file in the Office of the Clerk of the Supreme Court of the United States.

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TABLE OF AUTHORITIES.

CASES:

No. 83-672

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983.

FREDERICK E. ALTHISER, *et al.*,

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Respondents.

Reply Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Statement.

This reply brief is submitted to address arguments raised in the respondents' briefs in opposition. The State respondents' brief will be identified to as "SB", and the Kirkland respondents' brief as "KB". Numbers following will refer to the page number of the designated brief. The supplemental appendix will be similarly identified as "SA". All other references are as set forth in the petition.

Argument.

Title VII policy.

Respondents argue that acceptance of the petitioners' view would sound the "death knell for voluntary compliance and Title VII settlements". (KB12) Petitioners do not dispute that Ti-

tle VII policy favors settlement; as respondents themselves point out, petitioners have been favorably disposed to the idea of settlement of this case. (KB4, SB6)[1] However, Respondents' assertion that the policy in favor of settlement of Title VII claims supports their actions here must be unavailing as Title VII does not favor settlement at all costs. *E.E.O.C. v. Safeway Stores, Inc.*, 714 F 2d 567 (5th Cir. 1983); *United States v. City of Miami*, 644 F 2d 435, 451-52 (5th Cir., 1981) (*en banc*) (Gee, J., *concurring in part and dissenting in part*).

Settlement is favored because harmonious labor and race relations in the workplace will be fostered thereby. These goals will not be realized where, as here, interested and affected parties are not participants in the settlement process nor parties to the agreement.[2] In exchange for the Kirkland respondents' agreement to forego back pay claims, the State relinquished nothing of its own. Instead, it gave up that which it did not own, petitioners' civil service, contract and equal protection rights. This type of agreement is "unlikely to further true conciliation between all interested parties", *W.R. Grace & Co. v. Local 759*, 76 L Ed 2d 298, 310 (1983) (*"Grace"*).

As petitioners argued below, none of the employees should suffer if the employer is the wrongdoer.[3] Even though the underlying premise for the State's action is its own illegality, the State finds itself in a most comfortable position. It can confer a benefit upon minorities in order to further "New York State's policy" (SB26) *at no cost to itself*.[4] Instead, petitioners bear the entire burden of furthering a "policy" which is detrimental to

[1]While petitioners were welcome parties to one settlement conference, once their interests diverged from those of the respondents, they were excluded from further participation, and the settlement was submitted to the District Court without their knowledge.

[2]Respondents' citation to *Carson v. American Brands*, 450 US 79 (1981) draws attention to the gaps in their argument when it is considered that the settlement agreement in that case was supported by all parties. 606 F 2d 420, 427 (4th Cir. 1979) (*en banc*).

[3]Of course, the question of whether the employees should suffer for the wrongs of the employer presupposes a culpable employer. Here, the State has not been adjudged a wrongdoer and refuses to admit any wrongdoing whatsoever.

their career interests. If the State wishes to rely upon a "constructive" admission of discrimination, settle with only one of two equally interested parties, displace petitioners from their "rightful place" on the eligible list and by-pass the required findings of discrimination, it must assume the full cost of the remedy and compensate petitioners for any loss they suffer.[5] By perceiving the case as a confrontation between two groups of innocent employees with legitimate competing claims and assuming that one group would have to suffer as a result of the State's action, the courts below took an unnecessarily narrow view of the problem.

Commentators have noted that this Court's opinion in *Grace, supra,* "may signal a more creative approach to the dilemma". *The Supreme Court, 1982 Term,* 97 Harv. L. Rev., 269-78, 273 (1983). That note, which focuses upon the conflict between seniority and consent decrees containing race conscious relief states that the *Grace* alternative of directing the employer to compensate white employees affected by the consent decree places the burden upon the "guilty" party in accord with "popular notions of reparative justice", *Id.* at 275, and continues:

> "The *Grace* formula would be even more appropriate in cases that, like *Boston Firefighters,* involve public sector

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[4]The State takes the further position that because "the Second Circuit has not yet held an examination to be job-related where the examination had an adverse impact and where the validation was a content validation" (SB19, n.*), an attempt to defend this test would be too difficult and expensive. The State cites other "courts' [striking] down of selection procedures where alternatives existed which had less adverse impact" (SB20) to further support this claim. This contention must be rejected as another tests' invalidity is irrelevant to the test here and the principal that the enforcement of constitutional rights cannot be subject to financial consideration. *Goldberg v. Kelly,* 397 US 254, 263, 266 (1970); *Gideon v. Wainwright,* 372 US 335, 344 (1963); *Todaro v. Ward,* 565 F 2d 48, 54 n.8 (2nd Cir., 77).

[5]The Courts have recognized that the formulation of remedies in cases affecting identifiable career civil servants seeking promotion requires greater caution than the extreme care needed in the formulation of remedies in entry level hiring cases. *See, e.g., Guardians Association v. Civil Service Comm.,* 630 F 2d 79, 108 n.26 (2nd Cir., 1980) *cert. denied* 452 US 940 (1981).

employees. The enterprise liability rationale for making the employer bear the cost of preserving both vested seniority rights and integration goals is most forceful in a public employment setting: the taxpayers who will ultimately share the burden were parties to the past discrimination insofar as they tacitly condoned it by electing the officials who practiced it. Moreover, just as the public, by merely claiming fiscal duress, would not be permitted to condemn property or overrun individual property rights without compensating the owner, neither should the public be permitted to confiscate vested seniority rights without compensation.

From a practical perspective as well, a government employer is in a better position to provide a *Grace* remedy. Although such reallocations may require cutting back services that taxpayers want, the equity of demanding a relatively minor sacrifice from many in order to avoid imposing a crushing cost on a few is self-evident." *Id.* at 275-76.

Here the cost to the State of compensating innocent whites for the furtherance of its own purpose would be a *de minimus*. The rationale behind placing the burden upon the employer carries greater weight here where there has been no finding or admission of discrimination by the employer but instead voluntary State action the reasoning of the Court of Appeals constitutes a repudiation of the more enlightened approach of *Grace*.

Both the Title VII policy in favor of settlement as well as harmonious labor and race relations would be promoted by adoption of the *Grace* alternative rather than the agreement approved by the courts below as a standard for such cases. This approach of placing the burden upon the employer will encourage efforts to insure the validity of its selection procedures. To permit approval of the settlement is to remove all incentive to develop lawful selection devices, as it permits the State to resolve its problems by compromising the rights of third parties without cost to the State.

The contention that petitioners seek to undermine Title VII policy by forcing a full trial on the merits is similarly without

merit as petitioners do not contend that a full trial on the merits is necessary in all such cases. However, if, under the facts of a particular case, a trial on the merits is the most appropriate method of making the constitutionally required finding of discrimination, then a trial will be necessary. Adherence to these important constitutional principles must be maintained.

State law rights and the right to a hearing.

"[A] person whose name appears on an eligible list gain[s] *an enforceable right to be considered for an available position*. So long as a list is in force, promotions can be made only from the list and then only [pursuant to N.Y. Civ. Serv. L. §61(1)] . . . Not only is appearance on an eligible list important, but . . . one's place on a list could affect quite significantly one's chances to be considered for promotion. *Due process dictates that notice and an opportunity to intervene be given to [such persons].*" *Cassidy v. New York City Dept. of Corrections*, 95 AD2d 733, 734-35 (1st Dept. 1983). (Emphasis supplied, citations omitted.)

Respondents' assertion that petitioners have no right to defend the validity of the test because New York Law gives no such right is erroneous. New York Law gives petitioners a right to a hearing to prove that the basis for the State's failure to appoint in rank order was unlawful and impermissible.[6] *See, e.g., Yates v. Greco*, 85 AD2d 817 (3rd Dept. 1981); *Frank v. Tishelman*, 72 AD2d 604 (2nd Dept. 1979); *Donofrio v. Hastings*, 60 AD2d 989 (4th Dept. 1978). As under Federal Law,

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[6]Along these lines, petitioners note that the State, like the Court of Appeals, leaves unexplained the New York Court of Appeals holding that "each competitive civil servant does have the right to be promoted in accordance with his placement on the promotional list resulting from such an examination". *Schuyler v. Department of Personnel*, 39 NY 2d 851 (1976), aff'g 47 AD 2d 948 (2nd Dept., 1975) (Petition 21). The State does now concede that the test was "content validated" and is *at least* content valid (SB 19, n.*). Similarly significant is the Kirkland respondents concern about "the existence of defense depositions in the record" (SA 11) and about being forced to assume what they themselves characterize as the "*uncertainties* of litigation" (KB 12).

New York Law provides that race is an impermissible basis for refusing to consider a person on an eligible list. N.Y. Const. Art. I §11; N.Y. Exec. L. §296. Only if a compelling governmental interest is served is the racially based deviation from the eligible list permissible. Petitioners have the absolute right under New York Law to prove that the deviation is impermissible. This is so regardless of the difficulty of such proof. *Yates v. Greco, supra; Donofrio v. Hastings, supra.* Here, such right allows petitioners to be heard on the issue of whether the test is job-related.

The State's contention that the settlement does not contravene New York's merit and fitness principles on the ground that there has been no change in the determination that all on the eligible list meet the requirements is omissive; they fail to mention that in certifying the list they made a determination of *relative* merit and fitness not only merit and fitness generally. *See, generally* N.Y. Civ. Serv. L. §61(1). The assertion that the competitiveness requirement is fulfilled because "the zones, devised by a statistical formula, are an objective standard for measuring the results of the examination" (SB22), is flawed. As set forth in the petition (Petition 5-6, n.4) and as admitted by the Kirkland respondents (KB6, n.4), the zones are not being used.[1] Under those circumstances and because of the total disregard of the "rule of three", N.Y. Civ. Serv. L. §61(1), the competitiveness requirement has been sidestepped. Petitioners disagree with the State's interpretation of the "rule of three" (Petition 20-24). However, to demonstrate the clear violation of the rule even under the State's broad interpretation of the rule that interpretation will be used.

The four point "zone" structure "deems" all candidates to be of equal fitness for promotion. As a consequence any person with any of the nine different half point ratings within each zone are "deemed" to be equally fit. On the State's theory a promotion may be offered to anyone with a rating equal to that of the third highest ranking person. Pursuant to that theory, if the top three on the list each had a different rating, the State could appoint either of the top two or anyone with a rating equal to that of the third. That situation presents the largest permissible

range of selection (zone): a 1.5 point range. If any of the top three had the same score the largest permissible range of selection would be reduced to one point and if the top three had the same rating, they would have to choose someone within that same half point rating. The establishment of a 4.0 point zone impermissibly expands the lawful range of selection and thus violates New York Civil Service Law's "rule of three" and hence the preservation of benefits clause of the collective bargaining agreement (Petition 20-24).

The contention that seniority plays no role in the promotional process ignores the facts. Seniority credits equaling one full point on the test are granted for each five years of service or fraction thereof with the Department. Petitioners average over 16 years of service and hence average four seniority credits. The imposition of a minority preference within a four-point range has cancelled out the seniority credits earned by petitioners. Diminishment of the petitioners' seniority rights on the basis of only a *claim* of discrimination is intolerable. *EEOC v. Ford Motor Co.*, 73 L.Ed. 2d 721, 737-38 (1982).

In addition, the relative preference granted to minorities over whites determines "time in title" seniority which in turn determines a great number of rights including priority in layoff situations, bidding for jobs, shifts and job location as well as certain prerequisites of employment such as days off, vacation schedules and preference with regard to overtime work. Thus, far from being an inconsequential factor, seniority both affects and is affected by the promotional process.

Conflict with other circuits.

The decision of the Court below conflicts with *United States v. City of Miami, supra.* Respondents' claim that *Miami* permits a race conscious remedy without a finding or admission of liability is omissive. The Fifth Circuit modified the decree by deleting those portions which conflicted with the rights of the union. Based on its holding that "a party potentially prejudiced by a decree has a right to a judicial determination of the merits of its objection," *Id.* at 447. The Court remanded explaining

that the contested relief could be awarded only if the plaintiff "proved that discrimination, 'the necessary predicate for relief,' had taken place." *E.E.O.C. v. Safeway Stores, Inc.*, 714 F 2d 567, 578 (5th Cir. 1983). In *Safeway* the Fifth Circuit relying upon *Miami, supra,* and *Grace, supra,* reached a similar result stating: "If the *E.E.O.C.* seeks a remedy which would infringe upon the rights of a third party, it cannot rely upon its 'agreement' with another party to do so. Rather it must demonstrate the propriety of such relief in a judicial proceeding at which the third party is allowed to present its evidence and voice its objection." *Id.* at 579-80.[1]

Similarly and in contrast with the Court below, the Fifth Circuit rejected the argument that because the conflict between the racial preference and the rights governing the employment relationship was "less pronounced than in earlier cases," *Id.* at 578, the agreement could stand. In refusing to recognize "gradations in the rights of a party to due process," *Id.* at 578, the Court held that the settlement could not "be imposed upon the employees of the company over the [third parties'] protest without a trial on the merits." *Id.* at 579. The conflict with the court below is apparent when it is considered that neither the courts below nor the parties contend that petitioners have no protectable interest, nor assert that the harm to petitioners is *de*

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[1]Any suggestion that *E.E.O.C. v. Safeway Stores Inc., supra,* was inconsistent with the *en banc* ruling in *Miami, supra,* was put to rest by the Fifth Circuit's denial of the petition for a rehearing *en banc* in that case. 719 F 2d at 677 (5th Cir. 1983). In addition, this case is unlike *Bratton v. City of Detroit,* 704 F 2d 878 (6th Cir., 1983) *cert. denied* 52 USLW 3499. In *Bratton,* the Court had a record which was "replete with evidence to support the district court's conclusion that the Board of Police Commissioners was correct in finding that the Detroit Police Department had employed a consistent, overt policy of intentional discrimination against Blacks in all phases of its operations. [The District Judge] conducted a lengthy trial . . . and made comprehensive written findings of past discrimination dating as far back as . . . 1943." 704 F 2d at 888. This historical data was mostly undisputed and is outlined at 704 F 2d at 888-890.

In contrast, the instant case is not premised upon a history of past discrimination. (Petition 3, n.1) Respondents do not dispute this. The sole transaction upon which this settlement agreement is premised is the test.

minimus; instead terms such as "not overly oppressive" (29a), "some detriment" (21c), "modest" (14c, SB19) "least detrimental effect on interests of non-minority candidates" (31a), and "without substantially burdening non-minorities" (KB7), are used to describe the extent of harm suffered by petitioners and used by the Second Circuit to justify the holding that a court's subjective view of the importance of third parties' rights will govern gradations of a right to be heard. The conflict is direct and should be resolved.

Kirkland respondents.

The Kirkland respondents have attempted to transform the mere statistical disparity into what they term "overwhelming evidence of discrimination". (KB13) Lamentably, but predictably, the Kirkland respondents have chosen to infect the important genuine issues addressed by the courts below with matters which the courts specifically refused to consider. They refer to an affidavit by a man who claims to be an expert who states in conclusory fashion that certain unspecified questions in the test were not job-related. In addition, the Kirkland respondents cite the petitioners' failure "to proffer any evidence to support either the validity of the exam or the use of rank-ordering", (KB9), in support of their cause. Both contentions misrepresent the proceedings below. Unfortunately, these misrepresentations require the addition of a supplemental appendix consisting of the transcript of the proceedings where the District Court made clear that it would not consider these matters.

The District Court directed that the settling parties submit briefs to support the settlement and Petitioners were to reply. (SA7) The Kirkland respondents, however, chose to submit an affidavit from a man named Outtz (Hoots in the transcript and appendix) who claimed to be an expert. (SA2) In response, petitioners sought to have an expert review the test to evaluate whether or not it was job-related and to submit an affidavit in response. (SA6-7) That request was opposed by the respondents on the ground that "the State has taken the position and the plaintiffs have taken the position that we can settle this case without any finding of invalidity on the part of the exam." (SA10-11) The Court asked the Kirkland respondents what they were relying upon for approval of the settlement. "Your basic

motion . . . is the question of the job-relatedness of this exam that was given is not something that is to be litigated in connection with the settlement." (SA11) The Kirkland respondents answered "I think that is absolutely correct, Your Honor. I think the law is clear on that." (SA11) The District Court then made explicit that it would not try the issue of job-relatedness on affidavits but instead would have a trial if it determined that the question of job-relatedness of the test was an issue. (SA12) Petitioners again expressed their concern that if the affidavit of the claimed expert were included in the record, one of the parties might, as has happened here, some day attempt to convince a court to rely upon that affidavit and accept that as a "record fact" conceded by all parties as if it were a matter all parties had an opportunity to address and a matter adduced in the adversarial context. (SA13) The Court replied that the record would be absolutely clear that there was not any waiver of the right to rebut this claimed expert and that the Court would not tolerate the determination of the issue of job-relatedness by reliance upon one affidavit or another. (SA17)

The attempt to introduce this matter at this Court constitutes a *sub silentio* recognition by these celebrated discrimination attorneys that the statistics alone are an insufficient predicate for the imposition of a race-conscious remedy in the public sector. When stripped of these matters respondents' claims of "overwhelming evidence of discrimination" (KB9) are, in reality, only statistics showing a failure to achieve a representative percentage of minorities at each grading level of the examination and no more. The important question of whether that is sufficient to impose a race-conscious remedy is what is before this Court.

Dated: January 13, 1984

Respectfully submitted,

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Transcript of Proceedings Held on October 14, 1982.

(1) UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD L. KIRKLAND, *et al.*,

Plaintiffs,

v.

NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, *et al.*,

Defendants.

82 Civ. 295

New York, New York
October 14, 1982
3:40 p.m.

Before:

Hon. Thomas P. Griesa, District Judge.

Appearances:

O. Peter Sherwood, Esq., Attorney for plaintiffs.
Robert Abrams, Esq., Attorney General, State of New

York. By: Barbara B. Butler, Esq., Ann Horowitz, Esq., Assistant Attorneys General.

Beck, Halberg & Williamson, Esqs., Attorneys for McClay, *et al.* Intervenors. By: Herbert B. Halbert, Esq., Roman Beck, Esq., of Counsel.

(2) Rowley, Forrest & O'Donnell, P.C., Attorneys for Althiser Intervenors. By: Richard Rowley, Esq., Mark Walsh, Jr., Esq., Ronald G. Dunn, Esq., of Counsel.

The Court: I have gotten a memorandum from the plaintiffs and a memorandum from the defendants, and the next question is, what are the issues which the intervenors wish to deal with and how. Presumably it will be a modest brief, and that's all there is to it, there is really no problem. But if anybody is going to suggest anything other than that, submission of affidavits or factual hearing or anything like that, this is where we have to sort that out.

So, Mr. Rowley, I will start with you.

Mr. Rowley: Your Honor, I know you have already made your determination, but I again want to go on the record objecting to the limited nature of the intervention that has been granted to us, because we have been trying to get into this case ever since June. And we have never made any agreement with the State or the plaintiffs on the settlement of this case about any racial quotas or zones or anything else. That much being said, we do not think that the plaintiffs and the State have complied with your directives (3) as of the 4th of October, your Honor.

Mr. Sherwood has seen fit to include with his brief as an appendix to it, an affidavit of the merits by a man Hoots, which clearly relates to the question of whether or not the examination is a valid examination. He then also has his own affidavit of facts, and since he has a brief dealing with the law, I take it his affidavit is supposed to be dealing with the facts as to the questions of the factual issues involved.

The State of New York has likewise taken a similar attack and has filed a brief, a short memorandum with an affidavit by a man named Velarie, I guess it is, and a Mr. Murphy, both of which go to the merits of this case.

Your Honor, we understood there were to be briefs, and that only. I think, very candidly, based upon what I read from the record of the last hearing it has been represented to you, for example, that there is a record in this case, that there is a record that includes depositions upon which you are going to be able to make determinations of fact and to approve or disapprove this purported settlement.

Today we went down, your Honor, if I may hand this up, to the Clerk's office of this court and got a certified copy of the docket. There are no depositions on (4) file in the Clerk's office of this court. There is no record at all here, your Honor. The record here is very clear—

The Court: Let's not quibble. If the depositions haven't been filed and they exist, I don't care whether they have been filed or not. They can be furnished to you.

Mr. Rowley: They have not been furnished to us. Never. And none of the other materials have been furnished to us. The only thing we have ever gotten we got from the Clerk's office ourselves. Under those circumstances, your Honor, it seems to us that the plaintiff and the State have realized at this point that they must provide you with some kind of a record of factual matters to show that this examination is not valid.

The Court: No, wait a minute. Let's not jump too far. At the risk of repeating something I asked at the earlier hearing which I take it was the 4th of October—

Mr. Rowley: That was the last one. The first one was the 29th of September.

The Court: It's my understanding that what has been submitted to me in support of the proposed settlement is nothing more than the settlement agreement. In other

words, there has not been submitted to me—prior to this latest briefing there was simply a submission of the (5) settlement agreement, right?

Mr. Sherwood: That's all that we presented to you in August, Judge. But it is true that before that there had been, I believe, a motion for a preliminary injunction—

The Court: I'm not talking about that, please.

Mr. Sherwood: That had facts associated with it.

The Court: We are accustomed in this court, when somebody moves for approval of a class action, to have a motion, and that motion consists of, obviously, but this is just the beginning, of the proposed settlement agreement. And then there is usually whatever materials the proponents of the settlement want to submit in support of the settlement. Usually that consists of one or more affidavits and a brief describing the reasons why the settlement is fair and reasonable. And those things exist so that they are on record available for anybody who wants to look at them and oppose or whatever they want to do.

Now, here, we really, it seems to me, didn't—and I think we have got to get the record straightened out here. You submitted a proposed settlement agreement without any motion papers in favor of it. And are these the papers you want to submit in favor of the motion? What is it that you say supports this settlement? And I will not—I don't want a vague record which consists of depositions here and (6) there, some past motions. There should be a record in support of this settlement.

Mr. Sherwood: Your Honor, what was submitted to you in, I believe, the beginning of September or the end of August was a stipulation of settlement together with a bare bones motion.

Without any affidavits, without law, etc. And that was sort of in response to our understanding from our July meeting that the Judge, that you would not want a great

deal of additions to the record, although that did not mean that you wanted nothing more than just a bare bones motion.

We came back before you the end of September and at that time our understanding was—I guess October 4, was that we were to submit to you the kind of things you are now talking about: the motion together with affidavits in support of the settlement. Those affidavits similarly go to the standards, dealing with the standards for approval of a settlement.

It is not intended to make out an—to litigate, we do not intend to litigate by affidavit the case on the merits, because the settlement law doesn't require that, Judge. But you do need to have some factual basis to go forward with an application for approval. And we have provided you with nothing more than that, Judge.

(7) The Court: Okay. So I now have, through your latest brief and the State's brief and the affidavits submitted in connection therewith, what you believe supports the settlement?

Mr. Sherwood: That's correct.

The Court: Okay.

Now going back to Mr. Rowley, where do we go from here?

Mr. Rowley: We did not understand, your Honor, from the meeting here on the 29th, and subsequently, although I wasn't here, I read the minutes on the 4th of October, that there were going to be any affidavits submitted by anyone. And we have been clearly told by your Honor on the 29th that we were not to submit anything without the Court's prior permission.

We have nevertheless prepared at least one affidavit; however, we have not gone into any extensive factual discussion in opposition to these factual affidavits that have been submitted by the State and by the plaintiffs.

And we think we are entitled to do that, your Honor, so that you may make—

The Court: There is one reason that I have put some limits on what papers you can file, and that is, I have gone into that amply already and I don't need to repeat. But (8) as far as Mr. Sherwood's papers and the State's papers, they are really, by the papers they are now submitting, they are filling in the gaps which existed before.

In other words, they have a complete set of papers now for all to behold, which constitutes their submission in favor of the proposed settlement.

So again, I asked you what you proposed to submit, so it isn't a matter of—you don't have to get strenuous or—I want to hear and I have an absolutely open mind about whatever you propose to submit to counter these proposals in favor of the settlement. I will reserve the right to, you know, limit it, but I want to hear what you want to submit.

Mr. Rowley: Your Honor, we have a brief—I shouldn't say entirely drafted because it is not. We have a draft of a brief partially completed at this point. We want to submit also an affidavit, it is thick, it is thick merely because it's a photostat of two collective bargaining agreements, along with a short affidavit which is only four or five pages long.

But the selective bargaining agreements are essential that you have them before you so that you know what is going to be taken away from people and what impact you are going to be having on people if you approve this settlement. (9) We think that that is imperative.

Now that I understand a little bit more clearly the affidavit picture, we may want to submit a further affidavit in response to the Hoots affidavit or the affidavits of the State.

We may want to submit an affidavit of an expert who doesn't agree with Mr. Hoots. And, very candidly, I don't

believe I can do that by the 18th. I had no idea that we were going to see an affidavit like that. Beyond that, Mr. Sherwood took a great deal of trouble to serve us papers on time, for which I thank him. The State did not.

Mr. Sherwood: Mine were on time.

Mr. Rowley: Yes, as a matter of fact they were. We didn't get the State's papers until the day after they were due.

The Court: I think you are correct, I asked Mr. Sherwood to submit a brief giving me the arguments on the framework within which I should view the settlement. I think that is specifically what I asked for. And then you were supposed to respond. So now perhaps the issues have broadened a little beyond what, you know, we contemplated when we were last together.

Again, I think it's not quite normal to ask an attorney to, you know, forecast exactly what he is going to (10) put in, but I would like to get an idea from you, you are going to submit a brief, you are also going to submit a short affidavit enclosing the collective bargaining agreement or agreements, and then you may want to submit some affidavit in response to the Hoots affidavit. Is that it?

Mr. Rowley: And possibly these two affidavits of the State, beyond that. But the affidavit will not be voluminous, I assure you of that.

The Court: Just as long as they stick on the issues which you have discussed in court and they don't have a lot of repetitious material, that's all I care about. That is my main objective, that we keep the paperwork sensible. When can you have your materials in?

Mr. Rowley: We have not, your Honor, at this point, seen the examination before trial which are referred to by Mr. Sherwood and which he represented last week were in the record. We searched for them, they were not there. We have not seen those things. Mr. Sherwood did not serve us

with copies of his brief that he served upon us, the affidavits in support by the individuals. We simply don't have them.

Mr. Sherwood: Not true.

The Court: Hoots you don't.

Mr. Rowley: No, we have. But he said individual affidavits were to be attached to Schedule A, were not attached (11) to what we have. We don't know what these individual employees have said. We may or may not want to respond to it, I don't know.

The Court: Where is this referred to?

Mr. Sherwood: It is referred to at the end of my affidavit. I did not submit them simply because I could not get them. I could just as easily strike that paragraph from my affidavit.

The Court: Just help me out. Where are you talking about?

Mr. Sherwood: In my affidavit, the next to last paragraph makes reference to some affidavits which I had intended to file from class members basically saying that they support the settlement. You already have in the record some letters. You don't really need that, Judge. It is just some—

The Court: It's totally unnecessary. It would not add anything.

Mr. Sherwood: Not a whole lot. It would be an affirmative statement from the plaintiffs' class—

The Court: Frankly, unless somebody objects, I assume that they support the settlement.

Mr. Sherwood: That's all it goes to, Judge.

The Court: I am just going to make a note that (12) no other affidavits are to be submitted.

Mr. Sherwood: I would consent to strike that paragraph.

Mr. Rowley: In respect to the next paragraph, 18, you talk about an Exhibit B, Racial Composition of the

Department of Correctional Services. That was not with the papers that we received either.

Mr. Sherwood: I asked the State for a copy of that and I have not gotten that yet, Judge. I'd like to be able to provide you with that so you know what the Department looks like.

The Court: All right.

Mr. Rowley: We can't very well respond until we know what to respond to.

Mr. Sherwood: What is there to respond to the composition of the department, Judge? Those are the facts.

The Court: When can you have that?

Mr. Sherwood: Let me ask.

(Pause)

Mr. Sherwood: I will be able to tell them by the end of the day, Judge. I don't know from the State yet.

The Court: Okay. I think that is not going to be something that will be a matter of major controversy that has to take voluminous work, so let us put that aside, and you (13) work out your schedule. Give me an idea of when you propose to submit your papers. Don't worry about those little incidental things we just talked about.

Mr. Rowley: When can we have the examination before trial?

Mr. Sherwood: Your Honor, with respect to the examinations before trial—

The Court: You are not relying on the EBT's for the settlement.

Mr. Sherwood: That's true, your Honor, but I'd like to say, for example, these other intervenors asked me for a copy. I have already provided it to them. Mr. Rowley has yet to ask me for a copy, and that's the only reason he doesn't have it.

Mr. Rowley: That doesn't answer the question about how soon can we have it.

Mr. Butler: We have copies in court and we can give them to him right now.

Mr. Rowley: Supplied.

The Court: It's usually a lot easier to ask the lawyers than to come to court for it.

Mr. Walsh: When I was in Albany I asked Miss Butler for them.

Ms. Butler: And you got them.

(14) Mr. Rowley: Thank you very much for your speedy delivery.

The Court: Thank you for your speedy request. It would have been a lot easier to ask them than to go to the Clerk's office here.

Mr. Rowley: We relied on the official record, your Honor. That's the only thing we can rely on.

The Court: Oh, come on. It is not. Everybody knows that depositions are frequently not filed. They are possessed by the attorneys. When do we get your papers?

Mr. Rowley: I think I need two weeks from tomorrow. To get the affidaits, I also have not seen, and I would request at this time the same materials that Mr. Hoots was provided with: the packets, etc.

Mr. Sherwood: Your Honor, we are certainly happy to provide, with one exception, your Honor, we are willing to provide Mr. Rowley with that information. I have an objection with respect to the amount of time. The one exception is that we have been provided a copy of the example itself. It is subject to a protective order. That protective order precludes us from giving it to anyone other than the experts and the lawyers for the plaintiffs.

Of course, if the State wants to permit you to have it, fine. I am subject to a protective order.

(15) Ms. Butler: The reason we object to doing that at this point is that your Honor has made it quite clear that the intervenors are not here to object to the validity of the

exam, and what I hear 90 percent of Mr. Rowley saying is that they are going to now spend their time, look at the exam, look at the deposition, all to go to whether or not this exam was valid or not. We already decided when we appeared in front of your Honor—excuse me, your Honor decided that the issue of the validity of the exam was not going to be litigated, and all the time that Mr. Rowley is asking for, all the material he is asking for, all relates to whether or not the exam was or was not valid.

The State has taken the position and the plaintiffs have taken the position that we can settle this case without any finding of invalidity on the part of the exam. And that's all we're going back to now today.

The Court: The thought I have at the moment, and let me test it out on you, I take it, Mr. Sherwood, that nothing you have submitted, none of the affidavits and none of the briefs goes to the merits of your claim regarding the job relatedness of the exam or the issue of whether it is or is not job-related? You don't get into the merits of that, right?

Mr. Sherwood: Your Honor, Mr. Hoots' affidavit (16) does touch on that question. The reason I did that, your Honor, was because of the existence of defense depositions in the record. I could just as easily exclude that portion of Mr. Hoots' affidavit.

The important thrust of his affidavit is that the new methods that we are talking about will be an improvement on the old. That doesn't go to job-relatedness of the old. It simply says that this is better, and we can deal with that.

The Court: Your basic motion—and I don't think you have waived it—is, your basic motion is the question of job-relatedness of this exam that was given is not something that is to be litigated in connection with the settlement.

Mr. Sherman: I think that is absolutely correct, your Honor. I think the law is clear on that.

The Court: What I would suggest, Mr. Rowley, is this: that if we are going to get into the question of job-relatedness, I assume we will have a hearing and take evidence, have a trial, you know, if you want to call it that. I assume that we will not be litigating the question of the job-relatedness of the exam on some brief affidavits. My point is that you should not, it will do you no good to try to get a lot of materials together and start arguing the question of job-relatedness at the present juncture. Because (17) I won't—if I am going to try that issue, I am not going to try it on a few affidavits submitted in this way. We'll have a trial.

What you should do is to respond to their proposals for settlement, pro or con, and I'm sure it is going to be con, make your arguments of law, whatever they are, in opposition to his points, and he has made numerous points, and I assume that perhaps you will disagree with his interpretations of the law and his numerous points, or at least some of them.

Then if one of the points you want to make is that "We want to challenge," or "We want to go into the question of job-relatedness of the test, the validity of the test," then you should brief why it is you are entitled to do that in this settlement juncture.

And if you win on that point, then we'll have a trial. If you don't, then you don't win. But I think my point is clear. This is the reason it should not take a long time. You respond to his points of law. He's presented his point about how the settlement should be handled, and he's presented the idea that there is no need or appropriateness in trying the issue of job-relatedness, and in all respects his settlement is fair and reasonable. You should respond to that, if you wish to do that.

(18) And on the question of job-relatedness, you can't, it isn't a matter of trying that issue on these papers. You tell

me why there should be a trial or a hearing or further proceedings. If that is your position. And that should relieve you of the need to undertake an exam of that issue on its merits now, because this is not the time to do that, and it should mean that you could have your papers in much earlier than you thought.

I would suggest a week from tomorrow.

Mr. Rowley: May I point out the real problems that I have with that?

The Court: Yes.

Mr. Rowley: You have in your own hands an affidavit from a man who claims to be an expert, and for all I know he is. He claims, among other things, having reviewed the document, he made the following conclusions—3808 was not based on job analysis—pages 5 and 6—your Honor, it is factual, it goes to job-relatedness, it goes to the validity of the test, and that's all this affidavit goes to, because you can't compare a new procedure as better than the old procedure without analyzing the old procedure and saying what's wrong with it. This is my problem, your Honor. I want to protect this record.

If there is a record here upon which the Court (19) at some juncture may in its wisdom say, "We have the affidavit of Mr. Hoots and Mr. Hoots says this and there is no contradictory material in the record and I accept it as conceded by the other parties," then I have no record.

And as long as that is before the Court, your Honor, I have to make serious and strenuous objection to the suggestion.

Mr. Sherwood didn't put it in there because he didn't think it was necessary.

Mr. Sherwood: May I respond, your Honor?

Judge, before you are a variety of interests. There are the interest of the settling parties, there are the interests of the intervenors. The extent to which each of the parties

can go into any particular issue depends on what their interests and what their status is. The settled law, and if you look at page 14 of my brief, indicates what is the interest of third-party objectors, the intervenors in this situation. Their interest, Judge, as selected by EEOC versus AT&T Company, 556-F SEC at the bottom of page 14, it is limited to the appropriateness of the remedy.

So while the main parties may talk about the issue of a prima facie case, etc., and that is what Hoots' affidavit goes to, their interest is limited to whether or not the remedy that is being imposed is one that impacts (20) adversely on their rights.

The Court: Yes, but it seems to me from your papers that isn't such a simple question. Because when you are talking about the—and you have paragraph after paragraph with lots and lots of citations, all of which cases I haven't begun to read, and with statements that don't make it nearly as simple as I thought it was going to be from what you said in court here the other day.

For instance, subparagraph C on page 15, the use of ratios, goals, timetables, and other race-conscious remedies to correct discrimination or underutilization and to implement affirmative action in areas such as recruitment, hiring, training, and promotion is not unlawful, unjustified, or inappropriate, whereas here they are reasonably related to the legitimate State goal of achieving equality of employment opportunity.

Now, that is a very big mouthful, and does a goup of intervenors have a right to object that these measures are not reasonably related to the legitimate State goal of achieving equality of employment opportunity? If they have a right to object to that, then what is the boundary of their right to object that this is not a legitimate State goal of achieving equality of employment opportunity? Does that mean it is not foreclosed by your (21) statement, does it mean or

doesn't it mean that they can try to show that the test which is in question is perfectly good in and of itself as a means of achieving equality of employment opportunity?

I mean, I could go on and on with these paragraphs you have presented which do not have little simple questions which automatically and clearly forecloses going into the job-relatedness of the test.

Subparagraph D on page 16, the State may properly include provisions requiring affirmative action to rectify the effects of prior racial discrimination. Citation of five cases.

Do we have prior racial discrimination?

Is it relevant to the question of prior racial discrimination, whether the test is a valid test as far as race is concerned, or is discriminatory?

There is nothing in that paragraph which tells me anything about that. Frankly, your papers provide me a lot of verbiage and very little precision. You were more precise standing in court. But when it gets to putting something in writing, I get a lot of very vague, open-ended statements which will take, if you haven't done the work, somebody has got to do a lot of work to get them into precise terms in terms of this case.

(22) Mr. Sherwood: I thought that I had done that, your Honor. To the extent I failed to do that, I apologize. But let me say that the question of whether their interest here, and I think I state that in the brief, is the question of—

The Court: Look at paragraph 11, where the plaintiffs, etc.—intervening third parties have the right to file objections to the settlement and the right to attempt to demonstrate at the fairness hearing that the relief provided in the settlement has an unreasonable or unlawful impact on them. What is an unreasonable or unlawful impact on them?

Mr. Sherwood: There are two cases that I cite, Judge, that tell you that. There is Setzer versus Novak Investment

Company, which says essentially—and picking up on the Weber decision, if you have a race-conscious remedy—

The Court: Which you never cite in here, incidentally.

Mr. Sherwood: Yes, I do, Judge.

The Court: Where do you cite Weber? The crucial paragraphs in here are the paragraphs beginning at 8 on page 12 and running through the end. The rest of it is all familiar class action stuff.

Mr. Sherwood: Judge, if you look at page 9, (23) paragraph A—I'm sorry, paragraph 9 on page 13. In Setzer, the En Banque Eighth Circuit said that where you have underrepresentation, that is enough to permit an employer to adopt race-conscious remedial measures.

And it is simply on the basis of statistics, Judge, not going to the question of what particular devices within the selection process caused that, but where you have conspicuous underrepresentation, that is enough. That is what Setzer says.

BDO versus Young says the same thing.

The Court: I wish it were all that simple. But apparently you felt compelled to write a lot more after paragraph 9-A. And apparently you were worried about some other qualifications to these rights to settlement.

The point is, I cannot tell at this point, I don't know, and I don't get a clear message from your papers whether or not the intervenors here do have the right to challenge your position that this test is unlawful; and challenge it with some kind of an evidentiary hearing. If that is the foundation for the claim of discrimination action in other words, they are really saying this is a house of cards: that here you have got a litigation, you have got a settlement, you have got a quota system where you have got a lot of white officers who will be waiting a year or two (24) longer for their appointments than they would have if this quota system didn't go into effect—all of this is founded on a

claim of a bad test. And they say, really, since this affects our rights, the plaintiffs can't get together with the State and agree that the test is no good; this affects us.

They could be totally wrong, but I frankly cannot tell it from what you said at the moment.

Mr. Rowley, we got to figure out a way to get through this issue. I don't want to prejudice you in any way. I want to tell you that in the first instance I will limit your briefing on this issue of the job-relatedness to the sole question of whether we should have a hearing. The record will be absolutely clear. You are not wasting anything by failing to put in a lot of affidavit on the facts, on the merits of the job-relatedness thing. I am telling you not to put in such affidavits now until you have demonstrated you have got a right to do that, because I don't want to just stumble into a factual inquiry on something which could be, if Mr. Sherwood is right, it is irrelevant.

At the same time, I don't want to preclude from arguing that it is very relevant and we should have a trial. What do you want to argue? So that is the way we are going to leave it. I will expect your papers a week from tomorrow.

Mr. Rowley: May I ask a question? I have no (25) problem with that if the briefs are all that is concerned in this one affidavit. I would like to see the materials that Mr. Hoots had, I may wish to comment on those and I'm certainly willing that any protective order that applies to Mr. Sherwood with respect to the examination apply to us.

The Court: Not at this point. I am giving you a week and a day to reply. I don't think I need to say it many more times. I will assume you are not replying to the merits of what Hoots says at this point.

Mr. Rowley: Do I know then that the Hoots affidavit is either withdrawn or not to be—

The Court: It is not withdrawn at all. I am just telling you that I want to take this in stages. What Mr. Sherwood

said is that the reason he put in the Hoots material is to argue in favor of stage 2 of the settlement, that is, replacing the present format of written tests with other contemplated selection methods, he is not putting in the Hoots affidavit to literally demonstrate the job-relatedness of the test for, you know, as such; and therefore, I am telling you, you don't need to address that point. You just tell me whether you are entitled to a hearing or a factual determination on the job-relatedness of the test or not.

Mr. Rowley: Are we entitled to assume then for (26) purposes of the brief, that the test is valid? This is what we understood from the last meeting, unless Mr. Sherwood raises all of these questions about the Hoots affidavit.

The Court: You keep raising things that you should not raise. I am not conceding that the test is valid. I think I threw that out as a possible format just to have that assumed. Nobody bought that. I don't think I need to repeat myself any more. You brief all the points that you wish to brief in response to Mr. Sherwood on the question of job-relatedness. You do not need to go into the merits.

At this stage you just brief the question of whether we should have a factual determination. Let's leave it at that. That brief of yours will be due on the 22nd. Thanks a lot.

Mr. Rowley: You want that filed here with proof of service?

The Court: Sure.

Ms. Butler: Your Honor, I have another matter before we leave.

Mr. Halberg: Your Honor, we haven't had an opportunity to have our position heard.

The Court: All right.

Ms. Butler: Fairly briefly, your Honor, I am informed that Mr. Walsh would—from Rowley's firm—without (27) discussing the matter with myself or without discussing it with anybody else from my office, called one of the

people who worked for the Department of Correctional Services directly yesterday to ask for some information about this settlement, and it caused a good deal of consternation at the Department. I was called at home late last night and had to function on it and I'd like the Court to direct Mr. Rowley and his firm that in the future not to talk to my client directly but to talk to them directly through myself or Miss Horowitz.

The Court: Did this occur?

Mr. Rowley: That was a conversation. We talked to the Department of Correctional Services about many cases constantly, because we have many cases with them, your Honor. If we are directed not to communicate with the Department on this case except through the Attorney General, we will indeed accede to that direction. However, I would like to point this out, your Honor, that the communications from the State of New York to us frequently in this case come through the Department of Correctional Services, not through the Attorney General. Come the other way around.

Ms. Butler: The last time that I had a direct communication with Mr. Rowley was July 28, after we had had our meeting and sent a copy of the proposed stipulation to (28) Mr. Rowley. At the end of that conversation Mr. Rowley said he would get back to me, and I haven't heard from Mr. Rowley since, so I think that should be clear on the record that when he talks about communication, he is not talking to me directly.

The Court: I would think communication would—be in the normal manner. Each attorney has his clients. You have your clients, they consist of some employees of the correctional department. You can certainly communicate with them to your heart's content. But to communicate with the department officially, I would assume you and your colleagues would go through the attorneys.

Mr. Rowley: I take it that counsel and other people from the Department will do the same, then even when they come around the other way, because we regard those as official communications, when we got a telephone call from Mr. Rodriguez, for example, who has been here in the court, counsel for the Department—

The Court: I don't think we need to spend a lot of time on it.

Mr. Rowley: We will follow that procedure, your Honor.

The Court: We better be formal. Do you have anything you want to add?

(29) Mr. Halberg: Yes, your Honor. We represent McClay and other intervenors. I was reading the record of the hearing on the 29th, and I am very troubled by the fact that your Honor has counseled all the intervenors in a lump. Mr. Rowley's clients and our clients. We have never had any participation in this case. And by speaking of intervenors generally, there are certain things that happened in July in Mr. Rowley's participation which your Honor can use as a basis for making certain rulings. We have not had any participation in this case at all.

For that reason—

The Court: I don't think that that is necessary to go into. Mr. Rowley's client did not agree to the settlement and no matter whether I felt it would have been more efficient to have the position made clear or not, there wasn't any agreement by his clients and so that's water over the dam. All intervenors have all their rights to object until the Court rules.

Mr. Halberg: Because one of our objections, that is in line with one of our objections, your Honor. We believe that this settlement cannot be approved without certain of the participation of our clients.

The Court: You are participating.

Mr. Halberg: In any settlement or in any further (30) proceedings because we are adversely affected.

The Court: You are participating now?

Mr. Halberg: Yes, your Honor. And one of the points will be the requirement that we participate—why the settlement should not be approved—

The Court: You can write that up when you want, but you are participating.

Mr. Halberg: At this point, yes.

The Court: Thank you very much.

Mr. Halberg: So we didn't participate in the drafting of the settlement.

The Court: You have a right to object.

Mr. Halberg: Which we are doing.

The Court: Thank you.

(Time Noted: 4:25 p.m.)